(27,321)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 566.

THE CITY OF NEW YORK, APPELLANT,

vs.

THE CONSOLIDATED GAS COMPANY OF NEW YORK ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

& Detweiler (Inc.), Printers, Washington, D. C., December 29, 1919.

United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; THE CITY OF NEW YORK, Appellant.

Transcript of Record.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed June 7, 1919. William Parkin, Clerk.

1 *Order to Show Cause.*

District Court of the United States, Southern District of New York.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District, Defendants.

Upon reading and filing the petition of The City of New York, dated and verified the 29th day of January, 1919, and the bill of complaint in the above entitled action, verified January 16, 1919, annexed thereto, from which it appears that The City of New York claims an interest in the above entitled litigation.

Now, on motion of Wm. P. Burr, Esq., Corporation Counsel of The City of New York, it is

2 Ordered that the Consolidated Gas Company of New York, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District, show cause before this Court, at a stated Term thereof, to be held in Room 235 in the Post Office Building, in the Borough of Manhattan, in the City of

New York, on Friday, the 31st day of January, 1919, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why this Court should not make an order herein joining The City of New York as a party defendant in the above entitled action; and

Why The City of New York, the petitioner herein, should not have such other and further relief as to this Court may seem just and proper; and it is

Further ordered that service of a copy of this order and the petition upon which it is granted (except the printed bill of complaint, which is already on file with the Clerk of this Court and with the parties named as defendants herein), upon the said parties on or before the 29th day of January, 1919, shall be deemed sufficient.

Dated, New York, January 29, 1919.

JULIUS M. MAYER,
United States District Judge.

3 *Petition of The City of New York.*

District Court of the United States, Southern District of New York.

[In Equity.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District, Defendants.

To the Honorable Judge of the District Court of the United States for the Southern District of New York.

The petition of The City of New York, made through William P. Burr, Corporation Counsel, shows as follows upon information and belief:

I. Your petitioner, The City of New York, is a domestic municipal corporation organized and existing under and pursuant to the authority of Chapter 378 of the Laws of 1897 of the State of
4 New York as amended by Chapter 466 of the Laws of 1901 wherein and whereby it became the successor corporation of certain domestic municipal public corporations theretofore existing under and pursuant to ancient charters and acts of the Legislature.

II. The Consolidated Gas Company of New York, the complainant in the above entitled suit, is a corporation organized and existing under the laws of the State of New York.

III. The above entitled action was commenced in the District Court of the United States for the Southern District of New York by the filing of a bill of complaint in the office of the Clerk of said court and by the issuing of a subpœna ad respondendum on the 16th day of January, 1919; a copy of the said bill of complaint is hereto attached, made part hereof and marked Exhibit "A."

The object of this action is to have declared unconstitutional, null and void Chapter 125 of the Laws of 1906 providing for a rate for gas within certain portions of the City of New York of 80 cents per one thousand cubic feet and the relief prayed for in said bill of complaint specifically reads as follows:

"1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from
5 the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

IV. It appears from paragraph "VI" of said bill of complaint that the complainant herein exhibited in the Circuit Court of the United States for the Southern District of New York a bill of complaint in an action in which The City of New York was named as a necessary and proper party defendant together with the Attorney General of the State of New York, the District Attorney of New York County and the New York State Commission of Gas and Electricity which were named as co-defendants with The City of New York and in said bill relief similar to that sought for in the bill filed in the above entitled action was prayed for and the defendants named in said bill of complaint were duly served with process, appeared and filed answers and said cause of action was
6 duly heard and thereafter on April 3, 1908 there was filed in said court a final decree adjudging that the complainant, the Consolidated Gas Company of New York, was entitled to the relief prayed for and granting writ of permanent injunction prayed for in said bill of complaint.

Thereafter an appeal from said decree was duly taken by The City of New York, your petitioner, and the other defendants named

in said cause of action to the Supreme Court of the United States and said decree was by that court reversed and the cause of action remanded to the said Circuit Court with directions to dismiss the bill of complaint without prejudice and that on or about February 13, 1909, a decree was duly entered in said court dismissing said bill of complaint without prejudice.

V. In the present bill of complaint filed in the above entitled action The City of New York has not been joined as a party defendant. Charles D. Newton as Attorney General of the State of New York has been made a party and also Edward Swann as District Attorney of the County of New York of the State of New York for the reason that it would be the duty of those officials to prosecute the complainant criminally for each and every violation of Chapter 125 of the Laws of 1906 and force and collect the penalties prescribed by said statute and the defendants Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke as members of the Public Service Commission for the First District have been made parties to said cause of action for the reason that it is provided by Section 74 of the Public Service Commissions Law that whenever the said Commission shall be of opinion that a gas company was failing
7 or omitting to do anything required by law or is doing anything contrary to or in violation of law the said Commission shall direct their counsel to begin proceedings in the Supreme Court of the State of New York to have such action prevented by injunction or mandamus.

VI. It is alleged in paragraph "XVIII" of the complaint herein that the complainant has more than 498,630 customers in the City and County of New York to whom it is daily selling and distributing gas and that the amount of gas so sold and distributed during the year ending October 31, 1918, was 17,592,959,800 cubic feet and that many of said customers are financially irresponsible and only temporary residents of the City of New York.

These 498,630 individual customers were not made parties to the above entitled action and were not served with any process of this court and are, therefore, not before this Court.

Your petitioner, The City of New York, embraces both the territory in which the Consolidated Gas Company of New York, the complainant herein, operates, and also the population of said territory of which said large number of consumers is a component part. In the Court of Appeals of the State of New York, in Interborough Railway Co. v. William S. Rann, as Corporation Counsel of the City of Buffalo, reported in New York Law Journal, July 26, 1918, laid down the proposition that common rights of the inhabitants of the city are the rights of the city and in language as follows:

"* * * a municipal corporation consists, however, of both territory and inhabitants. As a legal conception, the cor-
8 poration is an entity distinct from its inhabitants, but it remains a local community, a body of persons, the sum total

of its inhabitants and the proper custodian and guardian of their collective rights. 'Every municipal corporation has a two-fold character, the one governmental, the other private' (19 R. C. L., 697). In its governmental capacity it may command, in its private character, as a collection of individuals, it must sometimes barter and bargain * * *. By the use of 'a convenient fiction' (People v. North River S. R. Co., 121 N. Y., 582, 622), it may be plausibly pressed that such rights are not the rights of the City of Buffalo, but if we look at the substance of things we must conclude that the common rights of the inhabitants of the city, secured through the agency of the city officials, are rights of the city * * *."

The complainant herein, the Consolidated Gas Company of New York, uses the streets of The City of New York, the petitioner herein, and enjoys the protection of its fire, police, water and other departments and The City of New York levies taxes upon the complainant under provisions of law and from many points of view of municipal administration is interested in the complainant herein and its operation.

VII. Section 255 of the Greater New York Charter, as amended by Chapter 466 of the Laws of 1901, and Chapter 602 of the Laws of 1917, provides in part:

"* * * The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law, in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties or to enforce the laws and ordinances * * *."

Chapter 125 of the Laws of 1906 is a local and city bill and affects solely the inhabitants of The City of New York and particularly the 498,660 customers of the complainant mentioned in paragraph XVIII of complainant's bill and the power and responsibility of representing such inhabitants of The City of New York and customers of the complainant in the litigation commenced by the filing of said bill to have said Chapter 125 of the Laws of 1906 declared unconstitutional has been imposed by said Section 255 of the Greater New York Charter, as amended, on the Corporation Counsel.

Such duty and responsibility is almost imposed on the Corporation Counsel by Chapter 247 of the Laws of 1913, which amended the General City Law and is known as The Home Rule Bill.

This act grants to the City

"the power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to

restrict the meaning of this general grant of power or to exe-
10 cute other powers comprehended within this general grant."

Among the specific powers granted to the City by this act are the following:

"To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

The term "general welfare," as used in the law just quoted, is defined in Section 21 of said law as follows:

"§21. Public or municipal purpose and general welfare defined. The terms 'public or municipal purpose' and 'general welfare,' as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration to the inhabitants of The City of New York and affects their health, happiness, comfort and convenience

VIII. Section 71 of the Public Service Commissions Law, which is Chapter 48 of the Consolidated Laws, provides in part as follows:

11 "Upon the complaint in writing of the mayor of a city * * * in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power * * * as to the illuminating power, purity, pressure or price of gas, * * * the proper commission shall investigate as to the cause for such complaint."

It appears from the above quoted portion of Section 71 of the Public Service Commissions Law that The City of New York would have the right to initiate a rate-making proceeding and it follows that if the City have the right to initiate a proceeding of that character, it surely must be conceded that the City would be a party interested in the subject of the action and would be entitled to intervene at any stage of an action brought to have a statutory rate declared unconstitutional.

IX. Chapter 736 of the Laws of 1905 fixed the rate for gas supplied to The City of New York at 75 cents per 100 cubic feet. In the litigation referred to in paragraph VI of the bill of complaint herein and entitled "Willcox vs. Consolidated Gas Co. of New York et al.", the validity of this act was sustained by the Supreme Court of the United States. (See 212 U. S. 19, 54). The United States Supreme Court in that case said:

"Lastly, it is objected that there is an illegal discrimination between the City and the consumers individually. We see no d

crimination which is illegal or for which good reasons could not be given. But neither the City nor the consumers are finding any fault with it, and the only interest of the complainant in the
12 question is to find out whether by the reduced price to the City the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

We cannot see from the whole evidence that the price fixed for gas supplied to the City by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers that price is not enough."

In the said litigation entitled "Willcox vs. Consolidated Gas Company of New York, et al.", the complainant herein made a special attack on said Chapter 736 of the Laws of 1905 on the ground that the same was unduly preferential and discriminatory against the general consumers of gas in the City of New York. It is not unlikely that an attack may be made on said Chapter 736 of the Laws of 1905 by the complainant to establish that this price or rate of 75 cents per one thousand cubic feet to The City of New York requires a service from the Consolidated Gas Company, the complainant herein, without substantial compensation in addition to cost and thus affects the rate to all consumers. In such event it would be necessary for the City to introduce evidence of the special conditions under which gas is supplied to The City of New York and to show that the complainant herein, the Consolidated Gas Com-
13 pany of New York, is not required to furnish gas to The City of New York without substantial remuneration and that the service of the complainant to the City of New York is no ground or basis for holding or contending that the existing rate to consumers is unconstitutional and confiscatory.

X. The state courts have generally recognized the right of The City of New York to intervene in actions brought in equity to have statutes fixing a maximum rate declared unconstitutional on the ground that they do not allow a sufficient return on the capital invested. (Quimby v. Public Service Commission, 223 N. Y. 244; Peo. etc. ex rel. Municipal Gas Company of City of Albany v. Public Service Commission, decided July 12, 1918, reported in 224 N. Y. 156).

XI. Equity Rule XXXVIII of the Supreme Court of the United States, provides, in part, as follows:

"* * * All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff * * *.

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the propriety of the main proceeding."

The City of New York, your petitioner herein, respectfully submits that a complete determination of the controversy arising
14 out of the above entitled litigation cannot be had without its presence as a party defendant and that it has an interest in the subject of said action which entitles it to an order permitting it to intervene in said litigation as a party defendant therein. The City of New York is the largest consumer of the gas furnished by the plaintiff company.

The City of New York, your petitioner, has no other means of protecting itself against any attack that may be made on the said 75 cent gas rate in said litigation than by and through intervention therein and that it could never obtain relief from a determination against the validity of said 75 cent statutory rate in said litigation unless it were permitted to intervene and protect itself therein.

XII. The bill of complaint herein was, on January 16, 1919, filed with the Clerk of this Court in printed form and copies thereof served on the Attorney General of the State of New York, the District Attorney of the County of New York and the Public Service Commission of the State of New York for the Frst District, and therefore your petitioner requests that in serving these papers service of the said printed bill of complaint be dispensed with.

No previous application has been made for the relief prayed for herein.

The reason why an order to show cause is asked instead of the usual five days' notice under Rule XIV of the general rules of practice of this court is that the time of the defendants to answer the complaint herein is about to expire and that a motion for an injunction may be made herein at any moment and your peti-
15 tioner is anxious to be able to appear as a party defendant on the argument of any such motion and to be in a position to answer the complaint herein without delay.

Wherefore your petitioner respectfully prays for an order permitting it to intervene as a party defendant in the above entitled action.

Dated New York, January 29, 1919.

THE CITY OF NEW YORK,
Petitioner.

By WILLIAM P. BURR,
Corporation Counsel.

16 District Court of the United States, Southern District of New York.

[In Equity.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY and FREDERICK J. H. KRACKE, Constituting the Public Service Commission of the State of New York, First District, Defendants.

STATE OF NEW YORK,
County of New York, ss:

William P. Burr, being duly sworn, says that he is the Corporation Counsel of the City of New York, and as such that he is an officer of the petitioner herein. That the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he be-
17 lieves it to be true. Deponent further says that the reason why this verification is not made by the petitioner is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department, and other departments of the city government, and from statements made to him by certain officers or agents of the petitioner.

(Signed) WILLIAM P. BURR.

Sworn to before me this 29th day of January, 1919.

(Signed) MATTHEW F. DUFFY,
Notary Public, Kings Co., No. 138.

18 *Bill of Complaint.*

(EXHIBIT A ATTACHED TO PLAINTIFF'S PETITION.)

District Court of the United States, Southern District of New York.

[In Equity.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY and FREDERICK J. H. KRACKE, Constituting the Public Service Commission of the State of New York, First District, Defendants.

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York.

The Consolidated Gas Company of New York, a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the County of New York, Borough of Manhattan, City of New York, in the Southern
19 District of New York, brings this its Bill of Complaint against Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commisson of the State of New York, First District; and thereupon your orator alleges, upon information and belief, and complains:

I. Your orator is a corporation, duly incorporated for the purpose of manufacturing and selling gas in the City and County of New York, under and by virtue of a Consolidation Agreement duly executed on September 29, 1884, pursuant to a statute of the State of New York, entitled, "An Act to Authorize the Consolidation of Manufacturing Corporations," known as Chaper 367 of the Laws of 1884. The said Consolidation Agreement was executed by the New York Gas Light Company, The Manhattan Gas Light Company, The Metropolitan Gas Light Company of the City of New York, The Municipal Gas Light Company of New York, The Knickerbocker Gas Light Company and The Harlem Gas Light Company, all of which were corporations theretofore duly organized and existing under the laws of the State of New York, with the property, powers and franchises hereinfter referred to. The said Agreement was thereafter duly filed in the offices of the Secretary of State of the State of New York and of the Clerk of New York County, on November 10, 1884, pursuant to said statute. Your orator was duly organized as a corporation thereunder, to continue for fifty years, by virtue of the said

Consolidation Agreement and of the aforesaid statute; but,
20 under the laws of New York, its corporate existence may, at any time, be extended, upon the consent of two-thirds in amount of the stockholders.

II. By virtue of the said Consolidation Agreement, your orator became the owner of various franchises or consents, duly obtained by its said predecessor companies, authorizinz them to lay, maintain and operate mains, pipes and conductors in the streets, highways and public places of the City and County of New York; and it further became the owner of, and entitled to maintain and operate, mains, pipes and conductors theretofore laid in the various streets, highways and public places in the said City and County of New York by the said predecessor companies; and it also became thereby the owner of large and expensive works for the manufacture and distribution of gas, which had been erected by the said various predecessor companies. Your orator has, ever since, been engaged in the business of manufacturing and selling gas to the inhabitants of the said City and County of New York, and to the City of New York, and has maintained and operated the said mains, pipes and conductors in the said streets, highways and public places of the said City and County of New York, and has laid additional mains, pipes and conductors therein. Your orator is required by law, under penalty, to supply gas, upon application of the owner or occupant, to all buildings and premises within one hundred feet of any main laid by it and to furnish gas meters to its consumers without rent or charge.

III. The defendant, Charles D. Newton, is now the Attorney General of the State of New York, and resides in Geneseo, State of New York.

21 IV. The defendant, Edward Swann, is the District Attorney of the County of New York, State of New York, and resides in the Borough of Manhattan, City of New York.

V. The defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constitute the Public Service Commission of the State of New York, for the First District, which includes the City of New York, and are now acting as such Commissioners, having been duly appointed under and by virtue of the provisions of Chapter 48 of the Consolidated Laws of the State of New York, prescribing their powers and providing for the regulation of certain public service corporations, including your orator. The said defendants are citizens of the State of New York and reside in the Borough of Brooklyn, City of New York.

VI. On May 1, 1906, your orator exhibited in the Circuit Court of the United States, for the Southern District of New York, its bill of complaint against Julius M. Mayer, as Attorney General of the State of New York, William Travers Jerome, as District Attorney of New York County, and Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and The City of New York, whereby your orator sought to have Chapters 736 and 737 of the Laws of 1905,

and Chapter 125 of the Laws of 1906 of the State of New York, and also a certain order of the Commission of Gas and Electricity of the State of New York, dated February 23, 1906, declared illegal and void, because in contravention of the Fourteenth Amendment to the Constitution of the United States and of Section 10 of Article
22 I of said Constitution; and your orator further prayed that writs of injunction might issue out of said Court, restraining each of the defendants from enforcing the said Acts and order against your orator, and for other and further relief, as in said bill of complaint more fully set forth.

VII. The defendants named in said bill of complaint were duly served with process and duly appeared and, respectively, filed answers in said cause. Thereafter, said cause was duly heard; and on April 3, 1908, there was filed in said Court a final decree, adjudging and decreeing that the complainant, your orator herein, was entitled to the relief prayed for, and granting the writs of permanent injunction prayed for in said bill of complaint.

VIII. Prior to the said final decree of the Circuit Court, William S. Jackson, successor to the said Julius M. Mayer, was duly substituted as a party defendant, as Attorney General of the State of New York; and William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, were duly substituted as parties defendant for said Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity.

IX. Thereafter, an appeal from the said decree was duly taken to the Supreme Court of the United States by the defendants; and the said decree was by that Court reversed and the cause remanded to the said Circuit Court, with directions to dismiss the bill without prejudice; and pursuant to the mandate of the Supreme
23 Court, the said cause was redocketed in said Circuit Court for the Southern District of New York; and on or about February 13, 1909, a decree was duly entered in said Court dismissing said bill of complaint without prejudice, in accordance with the opinion of the said Supreme Court.

X. The said decision of the Supreme Court was upon the ground that, although a return of less than six per cent. upon the value of its property would be confiscatory and although the finding of the lower Court, as modified by the Supreme Court, indicated that your orator would earn less than six per cent., yet the margin between possible confiscation and valid regulation was so close that it failed to show clearly and unmistakably that the rate of eighty cents per thousand cubic feet prescribed by said Act of 1906 would not afford your orator a fair and reasonable return upon the value of its property, especially in view of the fact that the said rate had never been in effect and the results upon the revenue of your orator under said rate were conjectural. The Supreme Court, in its said opinion (212 U. S., 19), recognized the constitutional right of your orator

to receive a return of at least six per cent. on the fair value of its property devoted to the public use, but said that it was desirable that there should be a practical test to determine the sufficiency or insufficiency of the return, and that if such test should show that your orator could not obtain a fair return under said rate, your orator should have the opportunity to again present its case to the Court; and to that end, the decree was reversed, with directions to dismiss the bill without prejudice.

24 XI. By said Chapter 125 of the Laws of 1906 of the State of New York, it is provided, that no corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the Borough of Manhattan, or in the Borough of The Bronx, in the City of New York, except in that portion thereof contained in the former towns of Eastchester and Pelham and in the former town of Westchester outside of the Villages of Wakefield and Williamsbridge, shall charge for gas manufactured, furnished or sold by it to the public a sum in excess of eighty cents per thousand cubic feet. The said Act provides that any corporation violating any provision thereof shall forfeit to the people of the State the sum of one thousand dollars for each offense.

XII. The value of your orator's property devoted to its gas business as of December 31, 1905, as found by the United States Circuit Court in the said former suit to review the said eighty cent law, as modified by the said decision of the Supreme Court of the United States, was $55,612,435. There has since then been added thereto, property which has cost your orator not less than $14,085,265, making the total value under normal conditions of your orator's property presently devoted to its gas business at least $69,697,700; and the cost of reproducing said property at the present time would greatly exceed that amount. In addition thereto, your orator is possessed of going value and other intangible assets of great value, many of which were omitted from the valuation of your orator's property in said former suit in the United States Circuit Court, which have since been recognized by the Courts and State Commissions as reasonable and proper; and there now exists an aggregate deficiency in
25 you orator's earnings below six per cent., since the date the said eighty-cent rate was made effective, in the amount of at least $12,000,000, which said sum should be added to the value of your orator's tangible property above stated, as going value, upon which your orator is entitled to a return.

XIII. During the year ending October 31, 1918, the gross operating revenues from your orator's gas business amounted to $15,764,288.11, and the cost of manufacturing and distributing said gas, together with taxes and other operating expenses, amounted to $15,665,046.46, leaving a net income from the business operation of your orator of only $99,241.65, which is less than one-fourth of one per cent. on the value of your orator's investment, as hereinbefore set forth, and which represents a return of six per cent. upon a principal sum of only $1,654,027.

The present value of your orator's investment, based upon the said eighty-cent gas case, exclusive of going value and other intangible property, is, as above stated, not less than $69,697,700. The principal sum upon which a return of six per cent. is earned is, as above stated, $1,654,027; and the minimum value of the property upon which your orator is deprived of any return by the said Act of 1906 is not less than $68,043,673, while the maximum value thereof, based upon the present cost of reproduction of said property, is a much greater amount.

A return of only six per cent. upon the minimum value aforesaid of your orator's investment in its gas properties would amount to not less than $4,181,862 per annum, or 23.29 cents per thou-
26 sand cubic feet of gas sold. The said net earnings of $99,241.65 for the year ending on October 31, 1918, amounted to only 55/100s of one cent per thousand cubic feet of gas sold. The deficiency in your orator's earnings during the said year below six per cent. on the minimum value of your orator's said investment amounted to $4,082,620.35, or 22.74 cents per thousand cubic feet of gas sold; and this deficiency is caused directly and solely by the arbitrarily restricted price at which your orator is compelled by the State of New York to supply gas to your orator's customers.

Your orator's average daily sales during the winter months amount to 62,728,800 cubic feet, which, at 22.74 cents per thousand, establishes as your orator's present daily loss, by reason of the said statutory rate, the sum of $14,264.53 per day, which loss your orator can by no possible means recover. This continuing daily loss is in addition to the deficiency of $4,082,620.35 in your orator's earnings during the year ended October 31, 1918.

XIV. The cost of manufacturing and distributing gas has greatly increased since the said former decree, by reason of the increase in the cost of coal, enriching oil and all other materials used in the manufacture and distribution of gas, in the large advance in the wages of employees, and in the increase in taxes; and there is a certainty that there will be a very substantial increase in such cost in the year 1919.

XV. The value of money has greatly depreciated and is now far less than at the time of said former decree; and the purchasing power of a dollar at the present time is the equivalent of only about
27 sixty cents at the time of said decree; so that an investor who might now receive ten per cent. upon his investment would not receive more than an investor in 1909 who received six per cent. upon his investment. A return or profit of six per cent. upon your orator's investment in its said plant and property is, therefore, no longer a fair, reasonable and adequate return upon such investment.

While the value of the dollar received by the stockholder has decreased as stated herein, the present cost of the property or similar property devoted to the public service has greatly increased; the result being that the owners of it, while receiving a return in a decreased purchasing power dollar are devoting a very greatly increased present cost investment to the public service.

XVI. The said rate of eighty cents per thousand cubic feet has, during the past year, practically deprived your orator of any return whatever upon the reasonable value of its property devoted to the manufacture and distribution of gas as aforesaid; and, at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon; and the said Act is in violation of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of your orator's contract with the State of New York; and it is also in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives your orator of its property without due process of law and denies to it the equal protection of the laws.

XVII. Your orator is advised by counsel, and verily believes, that the said Public Service Commission of the State of New York, 28 for the First District, has no power to permit your orator to increase the rate which it may charge for gas supplied, in excess of the maximum rate of eighty cents per thousand cubic feet prescribed by the said Act of 1905. If your orator should so attempt to increase its said rate, it would be unable to collect the same; for it is provided by the said Chapter 48 of the Consolidated Laws of the State of New York, that the charging by any gas company of any rate in excess of that permitted by law, shall be a complete defense to any action by such company against any consumer for any unpaid bill. Furthermore, it would be the duty of the defendants herein, Charles D. Newton, as Attorney General of the State of New York, and Edward Swann, as District Attorney of the County of New York, State of New York, to prosecute your orator for each such violation of law and to endeavor to enforce and collect the enormous penalties prescribed by said law; and it would be the duty of the defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, to cause suits in mandamus or for injunction to be brought against your orator under Section 74 of said Chapter 48 of the Consolidated Laws of New York, for the purpose of preventing your orator from so increasing its rates.

XVIII. Your orator now has more than 498,660 customers in the City and County of New York, to whom it is daily selling and distributing gas. The amount so sold and distributed during the year ending October 31, 1918, was 17,952,959,800 cubic feet. Many of said customers are financially irresponsible and only temporary residents of New York. Monthly bills for gas are rendered to 29 such customers by your orator, and unless such bills are promptly paid, the supply of gas to delinquent customers is discontinued by your orator, as authorized by law. If your orator should make a charge to any customer, in excess of the statutory rate of eighty cents per thousand cubic feet, your orator is informed and believes that such consumer would refuse to pay such charge, upon the pretext that the making of such charge is a complete defense to your orator's entire claim against such consumer. If your orator should thereupon discontinue service to such consumers and remove the meters, your orator is advised and believes that it would be at

once subjected to a multiplicity of suits from such consumers, to compel the restoration of such meters and service, as well as to prosecutions for the fines and penalities prescribed by said Act, which prescribes a penalty of $1,000 for each separate charge to any consumer in excess of the said statutory rate of eighty cents per thousand cubic feet. If your orator should make a charge in excess of said eighty-cent rate each month to each of its consumers, the aggregate of the penalties so incurred in one year would amount to over $5,983,920,000, and the damage to your orator would be irreparable and absolutely destructive of all its assets, franchises and property; and a refusal or failure to observe and comply with said statute, if only for the purpose of having the same tested in good faith in a court of law, would involve a risk of absolute ruin to your orator and the entire destruction and confiscation of its property, by reason of the enormous fines for which it would be the duty of the defendants Newton and Swann to institute suit, in accordance with the
30 requirements of Section 1962 of the Code of Civil Procedure of the State of New York. Your orator is, therefore, without adequate remedy at law for the redress of the wrongs suffered by the enforcement of said confiscatory rate and the enforcement of said Act of 1906; and such injury to your orator is irreparable except through the intervention of a court of equity.

XIX. The value of the business and property of your orator which is involved in this suit is greatly in excess of $3,000.

XX. To the end that your orator may have that relief which it can only obtain in a court of equity and that the defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived by your orator, it hereby prays:

1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants
31 and employees and any and every person acting under and by virtue of the authority of the said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act.

4. Your orator further prays that it have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

5. Your orator further prays that your Honors grant unto your orator a writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet.

And your orator will ever pray, etc.

CONSOLIDATED GAS COMPANY
OF NEW YORK,
By GEORGE B. CORTELYOU,
President.
SHEARMAN & STERLING,
Solicitors for Complainant, 55 Wall Street, New York.

JOHN A. GARVER,
Of Counsel.

32 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York:

GEORGE B. CORTELYOU, being duly sworn, says that he is the president of the Conoslidated Gas Company of New York, the complainant named in the foregoing bill of complaint, and has subscribed to the same, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that, as to those matters, he believes it to be true.

GEO. B. CORTELYOU.

Sworn to before me, January 16, 1919.

M. A. COSS,
Commissioner of Deeds, N. Y.
County Clerk's No. 255.

Commission expires Sept. 18, 1919.

33 *Affidavit of R. A. Carter Read in Opposition to Motion.*

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General, etc., Defendants.

STATE OF NEW YORK,
County of New York, ss:

R. A. CARTER, being duly sworn, says:

1. I am Vice-President of the Consolidated Gas Company of New York, the complainant herein.

2. No relief is sought against the City of New York in the present suit, which is brought for the sole purpose of attacking the Constitutionality of Chapter 125, of the Laws of 1906, in so far only as it attempts to limit the rate for gas sold to private consumers in the City of New York to 80¢ per thousand cubic feet.

No attack will be made by complainant in this suit upon Chapter 736 of the Laws of 1905 which prescribes a rate of 75¢ per thousand cubic feet for the City of New York and also prescribes the quality of gas to be supplied at that rate.

34 3. I am advised and believe that the City of New York has no interest in the said suit and is neither a necessary or proper party thereto.

R. A. CARTER.

Sworn to before me this 30th day of Jan., 1919.

EDGAR S. MURRAY,

[SEAL.] *Notary Public, Bronx County No. 34.*

Certificate filed in New York County No. 152.

Bronx County Register's No. 226.

New York County Register's No. 10163.

Commission expires March 30, 1920.

35 *Opinion of Judge Julius M. Mayer.*

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY and FREDERICK J. H. KRACKE, Constituting the Public Service Commission of the State of New York, First District, Defendants.

William P. Burr, Corporation Counsel, and Vincent Victory, Assistant Corporation Counsel, of counsel, for the motion.

Shearman & Sterling, attorney- for plaintiff (E. Henry Lacombe, John A. Carver and William L. Ransom, of counsel), all of New York City, opposed.

Charles D. Newton, Attorney General (Robert S. Conklin, Deputy Attorney General, of counsel);

Edward Swann, District Attorney and Assistant District Attorney Benvesaga.

Godfrey Goldmark, of counsel for Public Service Commission, First District.

36 MAYER, *District Judge:*

This is a motion by the Corporation Counsel on behalf of The City of New York, for an order under Equity Rule 37, to allow The City of New York to intervene as a party defendant in a suit brought by plaintiff to have declared unconstitutional and void the so-called Eighty-Cent Gas Law. The defendants in the present suit are the Attorney General of the State of New York, the District Attorney of the County of New York and the officials constituting the Public Service Commission of the State of New York, First District.

An outline of the history of the litigation in respect of the statute here concerned, and a statement of the status, as matter of law, of the various defendants and The City of New York, are desirable in order clearly to understand the subject matter of this motion; for the question before the court is solely a question of law and not one of public or administrative policy and the only power which the court has is to determine whether or not, under Equity Rule 37, The City has the right, as matter of law, to intervene and the court has the right to make its order accordingly.

By Chapter 736 of the Laws of 1905, all corporations or persons engaged in the business of furnishing or selling illuminating gas in The City of New York were forbidden to charge said City a higher price therefor than 75¢ per thousand cubic feet. This

statute dealt solely with the price of gas to The City of New York in its capacity as a municipal corporation.

Under Section 3 of this statute, it was provided that "any corporation * * * violating any provision of this act shall
37 forfeit the sum of one thousand dollars for each offense to be sued for and recovered in the name and by the city of New York for its benefit."

On April 3, 1906, the New York Legislature enacted Chapter 125 of the Laws of 1906 which fixed the price of gas for all persons or corporations manufacturing, furnishing or selling the same in the Borough of Manhattan, and certain other parts of The City of New York, at 80¢ per thousand cubic feet. This latter statute has become familiarly known as the 80¢ Gas Law. Under Section 3 of this statute, it was provided that "any corporation * * * violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state"; and by Section 4 it was provided that "this act shall not apply to gas furnished or sold to the city of New York."

Under Section 1962 of the New York Code of Cicil Procedure, it is provided that where a penalty is incurred to the people of the State pursuant to a provision of law "the attorney general or the district attorney of the county in which the action is triable, must bring an action to recover the * * * penalty, in a court having jurisdiction, thereof."

Chapter 737 of the Laws of 1905 established a State "Commission of Gas and Electricity" appointable by the Governor by and with the advice and consent of the State Senate. The statute conferred upon this Commission, among its other powers and duties, certain regulatory powers in respect of gas manufacture and sale, and certain powers and duties in relating to corporations or persons manufacturing or selling gas.

38 Chapter 125 of Laws of 1906 was to take effect on May 1, 1906. Prior to that date, Consolidated Gas Company brought suit in the then Circuit Court of the United States for the Southern District Court of New York, asserting that the rate under both statutes supra was confiscatory and, therefore, unconstitutional as in violation of the Fourteenth Amendment and also asserting that the difference in rate between that established for the municipality and that established for individual consumers created an unreasonable classification which amounted to a denial of the equal protection clause of the Fourteenth Amendment.

Plaintiff in that suit (which is the same plaintiff as in this suit) joined as parties defendants the public officers and official bodies upon whom was cast the duty of enforcing in one respect or another, the carrying out of both statutes, the constitutionality of which plaintiff was then attacking. The result was that, at the beginning of the suit, the defendants were the Attorney General of the State of New York, the District Attorney, the Commission of Gas and Electricity and The City of New York.

While the personnel of the public officers changed during the progress of the litigation, the only change in respect of the official

character of any defendant was that occasioned by the abolition of the Commission of Gas and Electricity and the creation of the Public Service Commissions. In due course, after the enactment of the Public Service Commissions Law, the officials constituting the Public Service Commission of the State of New York, First District, were substituted as defendants in place of those who had constituted the Commission of Gas and Electricity.

The statute was vigorously defended by the Attorney General, the Public Service Commission and The City of New York through its Corporation Counsel. The District Attorney, although a necessary party, was, for all practical purposes, a formal party and with entire propriety, in the circumstances, left the activities of the case to the other public officers and bodies.

The history of the litigation (the details of which need not be recited at length), will be found in outline in Consolidated Gas Co. v. Mayor, et al., 146 Fed. Rep., 150; Consolidated Gas Co. v. City of New York, et al., 157 Fed. Rep., 849; and Willcox vs. Consolidated Gas Co., 212 U. S., 19. The Supreme Court of the United States in Willcox v. Consolidated Gas Co., supra, held as follows:

"Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory.

It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and it is so ordered."

From the foregoing it is apparent that the opportunity was left open to plaintiff to bring another suit in the future when and if it thought it could show a state of facts, which would render unconstitutional the statutes in question.

In the present suit, Chapter 736 of the Laws of 1905 is not attacked. No relief whatever is sought against The City of New York and this suit is brought for the sole purpose of attacking the constitutionality of Chapter 125 of the Laws of 1906 in so far as that statute limits the rate for gas sold to private consumers in the City of New York to 80c per thousand cubic feet. It is further stated under oath, on behalf of plaintiff, that no attack will be made by plaintiff in this suit upon Chapter 736 of the Laws of 1905.

At the outset, therefore, it will be seen that the actual situation in the present suit differs from that which obtained in the previous suit, in some important particulars: First, as above set forth, the statute fixing the price of gas to The City of New York is not now in controversy, and, secondly, the Public Service Commission, First District, which only became a party after the first suit had been in progress for some time, is the official body of local purisdiction under existing law which is charged with safeguarding the rights and interests of those affected by the 80c. rate secured under Chapter 125 of the Laws

of 1906. The Public Service Commissions Law being Chapter 429 of the Laws of 1907, went into effect on July 1, 1907. The general plan and purpose of that statute was to create a new body of public officials upon whom was conferred new and important powers in respect of the regulation and supervision of certain classes of public utilities, some of which powers had theretofore been confided to municipal or other local authorities. The legislature provided for
41 two public service districts, and for a Commission in each district, the first district including those counties which constitute The City of New York.

It is unnecessary to set forth in detail the important powers conferred upon these Commissions and it is sufficient in that connection to refer to Section 74 of the Public Service Commissions Law to point out the comprehensive and responsible duties of the Commissions in regard to gas corporations. That section provides as follows:

"Whenever either commission shall be of opinion that a gas corporation * * * or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the Commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction." * * *

From the foregoing it appears that the Commission in a proper case is authorized to proceed not only against gas corporations, but even against a municipality itself. On the other hand, where a
42 municipal corporation makes complaint through its Mayor, the Commission must investigate and take such steps as may be appropriate; for it is provided in Section 71 of the Public Service Commission Law as follows:

"§71. Complaints as to quality and price of gas and electricity: Investigation by Commission: * * * Upon the complaint in writing of the mayor of a city, * * * in which a person or corporation is authorized to manufacture, sell or supply gas * * * for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas * * * in cities of the first * * * class * * * either as to the illuminating power, purity, pressure or price of gas * * * sold and delivered in such municipality, the proper commission shall investigate as to the cause for such complaint."

Any attempt, therefore, by any gas corporation either by way of omission or commission, to do an act contrary to law, was safeguarded by the legislature by imposing upon the Public Service Commission

of either district, as the case might be, the affirmative duties set forth in Sections 71 and 74, supra; and it was the legislative will that this body should be held responsible for the taking of any steps necessary to obtain redress for or protection against the violation of relevant statutes, such for instance, as the statute here in controversy.

In other words, the statutory law of New York has erected a system whereby it has charged Public Service Commissions with
43 certain duties and responsibilities in local communities, such as municipalities which, at least prior to Chapter 737 of Laws of 1905, would have been imposed upon municipal officials. The Public Service Commissions Law was a new departure in State policy and as one of its results, the responsibility in law of defending the statute here concerned rests not upon the municipal corporation known as The City of New York, but upon a commission having jurisdiction within a defined territory co-terminous with The City of New York.

In addition to the duty of the Attorney General or the District Attorney of the County to prosecute for penalties as above pointed out, Section 68 of the Executive Law, which became effective May 2, 1913, exhibits the policy of the State of New York in desiring that its Attorney General shall resist attacks against the constitutionality of its statutes—a statutory responsibility which did not exist, when the case of Consolidated Gas Co. v. Mayer, supra, was begun, unless the Attorney General was made a party to a suit by reason of a statutory duty.

"§68. Attorney-General to appear in cases involving the constitutionality of an act of the legislature. Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question to serve notice thereof on the attorney-general and that the attorney-general be per-
44 mitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto,, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

Of course, the courts referred to in Section 68 are necessarily the State court, but in view of this important State statute, the United States courts might very well regard the Attorney General as having a legal interest in a case in which the constitutionality of a State statute is involved, even though he were not charged with some specific duty under the statute. Indeed, the safeguards with which Congress has surrounded cases involving the constitutionality of State statutes, is illustrated by Section 266 of the Judicial Code by which it is provided, inter alia, that no interlocutory injunction

suspending or restraining the enforcement of a State statute shall be issued or granted unless due notice has been given to the Governor and the Attorney General of the state and unless a majority of three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, shall concur in granting such application. The result is that in the case now pending here, while the effect of the statute in controversy is purely local, and the Attorney General may well look to the Public Service Commission for the fullest aid
45 and co-operation, yet the responsibility rests upon the Attorney General of being one of those public officers who must defend the constitutionality of this act. This responsibility is fully appreciated both by the Attorney General and by the Public Service Commission, First District, and they each intend vigorously to defend the enactment.

What active part the District Attorney is called upon to take is for him to determine, but there can be no question that he also will properly discharge such duty as is cast upon him.

The attitude of the Attorney General, the District Attorney and the Public Service Commission, First District, upon this motion, is, that while each, of course, is earnest in the performance of and the intention to perform his or its respective duties, they have no objection to the intervention of The City of New York as party defendant and necessarily leave the matter to the decision of the court to be disposed of as the law may require.

From the foregoing, it is apparent that every officer or public body who or which is charged by law with a duty in respect of the defense of the 80c. gas statute and of this law suit, has been made the party defendant.

The question then for the court to determine is, whether, as a matter of law, over the objection of plaintiff, the court can order that The City of New York be made a party defendant.

Preliminarily, it may be pointed out that the Supreme Court of the United States has held that "the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

Re Engelhard & Sons Company, 231 U. S., 646.

46 Such was the procedure in Wilcox v. Consolidated Gas Co., supra.

The City of New York, in the previous litigation, was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

Consolidated Gas Co. v. Mayer, 146 Fed., Rep., 150;
Richman v. Consolidated Gas Co., 114 App. Div., 216, 224;
Buffalo Gas Co. v. City of Buffalo, 156 Fed. Rep., 370.

In the Richman case, supra, the New York Appellante Division of the First Department, held, "Of course, The City of New York does not represent the private consumers of gas." This view sustained the contention of Mr. (now Mr. Justice) Shearn, who insisted

that the restraining order of the United States Circuit Court did not run against Richman, a private consumer, because neither he nor any private consumer was a party to the suit in the United States Court.

The question then is whether the City of New York is a "proper" party defendant or has "an interest in the litigation" within the meaning of Equity Rule 37. That rule, which, with the other new Equity Rules, became effective on February 1, 1913, is as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly au-
47 thorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reasons be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

The rule is a new rule and the part as to intervention, according to Hopkins' Federal Equity Rules, was suggested by the Bar Committee of the Circuit Court of Appeals of the Eighth Circuit. Speaking generally and not technically, the rule is the same in character as rules found in the statutes of various states. (See, for instance, New York Code of Civil Procedure, sec. 447.) All but the last paragraph clearly refers to those who must or may be made a party defendant by the plaintiff.

A "complete determination" of the cause obviously refers to a determination of every issue in such manner and as to such parties as to render the decree res adjudicata.

48 The long settled practice in Equity is that a person cannot be made a party defendant on his own application, unless so required by statute.

Toler v. East Tennessee V. & G. Ry. Co., 67 Fed. Rep., 168; per Lurton, J., afterwards a Justice of the Supreme Court.
Coleman v. Martin, 6 Blatchf., 119;
Drake v. Goodridge, 6 Blatchf., 151;
Gregory v. Pike, 67 Fed. Rep., 837.

That The City of New York is not a necessary party defendant has already been made clear. That it is not a proper party defendant in the sense of the law, will be at once appreciated, when it is understood what is meant by a "proper" party.

The subject is carefully discussed by Street in his "Federal Equity Practice" Vol. 1, sec. 507 where he accepted the rule laid down by Judge Sanborn in Donovan v. Campion, 85 Fed. Rep. 72, as follows:

(1) All those whose presence is necessary to a determination of the entire controversy must be made parties to the suit; and (2) all those who have such an interest in the subject-matter of the litigation that the decree, if it should be res adjudicata against them, would cause them gain or loss through the direct operation and effect of the decree, may be made parties thereto, if the complainant or the Court is of the opinion that their interest in the litigation may be conveniently settled at the same time as the rights and interests of the "necessary" parties and thus the decree made to run against all those potentially affected by it.

49 Parties embraced under (1) above, the author quotes Judge Sanborn as pronouncing "necessary" parties; those under (2) above, as "proper" parties, within the concepts of a Court of equity.

In Section 509, Street deals with "proper parties," and defines them as follows:

"A proper party, as distinguished from one whose presence is necessary, to the determination of the controversy, is one who has an interest in the subject-matter of the litigation that may be conveniently settled therein."

In view of the foregoing, and to illustrate, it may very well be that a beneficiary of a trust is a proper party, while the trustee is a necessary party.

Thus, under old Rule 49, in suits concerning real estate, the trustee was a necessary party while a beneficiary might be made a defendant in the court's discretion, because a proper party.

"In such cases" the rule stated, "it shall not be necessary to make the persons beneficially interested * * * parties to the suit; but the Court may * * *, if it shall so think fit, order such persons to be made parties."

Section 255 of the Greater New York Charter which defines the duties and powers of the Corporation Counsel, does not confer upon that official rights or duties which the municipality or its departments and officers do not possess and does not make the municipality a necessary or proper party where it has no legal interest in a litigation. If plaintiff had joined The City of New York as a party defendant in this suit and such joinder had been resisted, there can be no question that the Court would have been bound to hold that

50 The City of New York could not be made a party defendant.

Referring now to the last paragraph of Rule 37, it is plain that "interest" means a legal interest. Indeed, the word "interest" is used four times in Rule 37 and must be construed ejusdem generis. In every instance, it is manifest that the interest must be a legal interest as those words are understood in the law. There never can be a legal interest in a suit in equity unless, as the result of the litigation, the decree affects the person or corporation claiming the interest.

An illustration of interest is Weatherly v. Perkins, 160 Nev. Rep.,

611, where the court, under the Michigan law, allowing interventions in cases at law and equity, granted the petition to intervene of a liquor dealer, in an action brought against his surety on a bond, which rendered the surety company liable in the event that there was an illegal sale of liquor by the dealer.

Another illustration is Central Trust Co. v. Chicago, R. I. & P. R. Co., 218 Fed. Rep., 336, where the intervenors were bondholders who would be directly affected by the decree.

The City of New York, however, in its corporate capacity will in no manner be affected by any decree which can be made herein. The rights of the consumers will be affected but The City of New York as a municipal corporation is not their legal representative in this suit, but their rights under the laws of the State of New York must be safeguarded by other public officials, viz: the At-
51 torney General, the District Attorney and the Public Service Commission.

Village of South Glens Falls v. Public Service Commission for the 2nd District, Court of Appeals, decided January 18, 1919.

Re Engelhard & Sons Company, supra.

Indeed, the fact that the function of The City of New York, so far as concerns Chapter 125 of Laws of 1906, is confined to the filing of a written complaint by the Mayor, as provided in section 71 of the Public Service Commissions Law, supra, has, in principle, been fully recognized by the New York Courts.

Quinby v. Public Service Comm. 223 N. Y., 244;

Village of South Glens Falls v. Public Service Comm. for 2nd District, supra.

In all the cases cited where The City of New York or some other city or governmental subdivision was a party, it will be found that the city had a legal interest either (1) because a legislative act directly affecting it was attacked, or (2) because, by reason of some franchise or some statutory provision, the city had an interest or a duty as matter of law.

But in this case there is neither legal interest nor legal duty.

It appearing, therefore, that the court is without power and that the application is not one in respect of which the Court may exercise judicial discretion, the motion is denied.

In conclusion, it may be observed that, of course, it is the practice of this court to permit briefs to be submitted amicus curiae,
52 and, no doubt, any judge of this court before whom the case shall hereafter be presented, will be glad to receive such brief or briefs, as the learned Corporation Counsel may be pleased to submit.

Settle order on 3 days' notice.

JULIUS M. MAYER,
District Judge.

February 24, 1919.

53 *Memorandum of Judge Julius M. Mayer Made on Settlement of Order of March 3, 1919.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complain-t,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, et al., Defendants.

Memorandum.

The order herein is signed contempqraneously herewith. What I have endeavored to make clear in the order is that I have not passed upon the motion as a matter of discretion either one way or the other. If I am right, then the matter of discretion is of no consequence. If I am in error, then this court at some time hereafter will be called upon to determine the disposition of the motion as matter of discretion.

JULIUS M. MAYER,
District Judge.

March 3, 1919.

54 *Order Denying Application of The City of New York to Intervene.*

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, held at the Court Rooms in the Post Office Building, in the Borough of Manhattan, City of New York, on March 3, 1919.

Present: Hon. Julius M. Mayer, District Judge.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY and FREDERICK J. H. KRACKE, Constituting the Public Service Commission of the State of New York, First District, Defendants.

This cause came on to be heard at this Term upon the petition of The City of New York, dated and verified the 29th day of January 1919, praying for an order permitting it to intervene as a party de

fendant in this cause, and was argued by counsel; and there-
55-67 upon, upon consideration thereof and upon motion of Shearman and Sterling, Solicitors for the Complainant, it is

Ordered, adjudged and decreed, that the said motion to intervene be and the same hereby is denied as matter of law, and the said petition of The City of New York be and the same hereby is dismissed, the court not passing on the matter as one of discretion, because not necessary at this time, but reserving the right so to do if in error as to the law.

JULIUS M. MAYER,
U. S. District Judge.

68 *Assignment of Errors.*

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant.

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants.

And now comes The City of New York and makes and files its assignment of errors as follows:

First. The District Court of the United States erred in holding that The City of New York in the previous litigation herein was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

Second. The District Court of the United States erred in holding that every officer or public body, who or which is charged by law with a duty in respect of the defense of the 80 per cent gas statute and of this law suit, has been made a party defendant.

69 Third. The District Court of the United States erred in holding that The City of New York is not a proper party defendant within the meaning of Equity Rule 37.

Fourth. The District Court of the United States erred in holding that The City of New York is not a necessary party within the meaning of Equity Rule 37 and to this litigation.

Fifth. The District Court of the United States erred in holding that the City of New York has no interest in this litigation within the meaning of Equity Rule 37.

Sixth. The District Court of the United States erred in denying the application of The City of New York for an order permitting it to intervene as a party defendant in this litigation.

Dated, New York, May 29, 1919.

WILLIAM P. BURR,
Corporation Counsel.

JOHN P. O'BRIEN, *Of Counsel.*

70 *Petition for Appeal, Allowance and Directions as to Bond.*

District Court of the United States, Southern District of New York.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants.

The City of New York, conceiving itself aggrieved by the final order or decree dated March 3, 1919, and filed and entered herein on March 3, 1919, and by the order dated May 28, 1919, and filed and entered herein on May 28, 1919, refusing to resettle said order of March 3, 1919 in the above entitled cause, doth hereby appeal from said final order or decree of March 3, 1919 and from said order or decree of May 28, 1919 refusing to resettle said order of March 3, 1919, to the Circuit Court of Appeals of the United States for the Second Circuit and it prays that this appeal may be allowed
71 and that a transcript from the record of this cause and these proceedings and the papers upon which said final order or decree and order refusing to resettle said order were made, duly authenticated, may be sent to the Circuit Court of Appeals of the United States for the Second Circuit.

Dated, New York, May 29, 1919.

WILLIAM P. BURR,
Corporation Counsel, Municipal Building, Borough of Manhattan, City of New York.

And now, to wit, on May 29, 1919, it is

Ordered that the appeal prayed for in the petition of The City of New York be allowed.

Dated, New York, May 29, 1919.

JULIUS M. MAYER,
U. S. D. J.

Bond to cover costs of appeal will be dispensed with in this case.

JULIUS M. MAYER,
U. S. D. J.

I think this order is not appealable but I allow it so the question can be raised.

J. M. M.,
D. J.

72 *Citation on Appeal.*

District Court of the United States, Southern District of New York.

[In Equity. No. 15—358.]

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants.

UNITED STATES OF AMERICA, *ss:*

To

Consolidated Gas Company of New York;

Charles D. Newton, as Attorney General of the State of New York;

Edward Swann, as District Attorney of the County of New York, State of New York, and

Lewis Nixon, constituting the Public Service Commission of the State of New York, First District:

73 You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States for the Second Circuit to be held on the 27th day of June, 1919, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein the City of New York is appellant and Consolidated Gas Company of New York, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, are respondents, to show cause, if any there be, why the final order or decree in said notice of appeal mentioned, and the order refusing to resettle said final order or decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand and the seal of the District Court of the United States for the Southern District of New York, this twenty-ninth day of May, in the year of Our Lord, one thousand nine hundred and nineteen.

JULIUS M. MAYER,
Judge of the District Court of the United States for the Southern District of New York.

74 United States Circuit Court of Appeals for the Second Circuit, October Term, 1918.

No. 240.

Argued June 19, 1919. Decided June 27, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and TRAVIS H. WHITNEY, CHARLES S. HERVEY, and FREDERICK J. H. KRACKE, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; THE CITY OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

Appeal from an Order of the District Court Denying Application of the State of New York for Leave to Intervene as a Party Defendant.

75 William P. Burr, Corporation Counsel, for Appellant.
William P. Burr, Terence Farley, Vincent Victory and Judson Hyatt, of Counsel.
Shearman & Sterling, for Appellee.
E. Henry Lacombe, John A. Garver and William L. Ransom, of Counsel.

Per Curiam:

Order affirmed.

76 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 7th day of July, one thousand nine hundred and nineteen.

Present:

Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Circuit Judges.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

v.

CHARLES D. NEWTON, as Attorney General of the State of New York, etc., et al., Defendants; CITY OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
H. W. R.

77 Endorsed:

United States Circuit Court of Appeals, Second Circuit.

Cons. Gas. Co.

v.

C. D. Newton and ano.

Order for Mandate.

United States Circuit Court of Appeals, Second Circuit. Filed Jul. 18, 1919. William Parkin, Clerk.

78 United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; THE CITY OF NEW YORK, Petitioner and Appellant.

The above-named petitioner, The City of New York, conceiving itself aggrieved by the order of the Circuit Court of Appeals, Second Circuit, filed and entered herein on July 18th 1919, affirming the

order of the District Court for the Southern District of New York, dated and entered on March 3, 1919, in the above-entitled action, and directing the issue of the mandate therein, doth hereby appeal from said order to the Supreme Court of the United States, and it prays that this, its appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM P. BURR,
Corporation Counsel of the City of New York,
and Solicitor for The City of New York.

Office & Post Office Address: Municipal Building, Borough of Manhattan, New York City.

New York, September 23rd, 1919.

And now, to wit: It is ordered that the appeal be allowed as prayed for.

H. G. WARD,
Judge of the United States Circuit Court of Appeals.

Bond is hereby fixed at $250 for costs.

H. G. WARD,
J. U. S. C., C. A.

79 (Endorsed:)

County Clerk's Index Number, — year 191 —.

United States Circuit Court of Appeals for the Second District.

Consolidated Gas Company of New York, Complainant-Appellee,

vs.

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Petitioner and Appellant.

Petition, Appeal & Allowance.

WILLIAM P. BURR,
Corporation Counsel.

Municipal Building, Borough of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Sept. 23, 1919. William Parkin, Clerk.

80 Circuit Court of Appeals for the Second Circuit.

CONSOLIDATED GAS COMPANY OF NEW YORK, Plaintiff-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Appellant.

And now comes The City of New York and makes and files its assignment of errors as follows:

First. The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming the order of March 3, 1919 of the District Court of the United States for the Southern District of New York and in thereby denying the application of The City of New York for an order permitting it to intervene as a party defendant in this litigation and also in refusing to reverse said order of March 3, 1919 of the District Court of the United States for the Southern District of New York filed and entered herein on March 3, 1919.

Second. The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court and in thereby holding that The City of New York in the previous litigation herein was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

81 Third. The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that every officer or public body who or which is charged by law with a duty in respect of the defense of the 80 cent gas statute and of this law suit, has been made a party defendant.

Fourth. The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that The City of New York is not a proper party defendant within the meaning of Equity Rule 37.

Fifth. The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that The City of New York is not a necessary party within the meaning of Equity Rule 37 and to this litigation.

Sixth. The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in

thereby holding that The City of New York has no interest in this litigation within the meaning of said Equity Rule 37.

Dated, New York, September 22, 1919.

WILLIAM P. BURR,
Corporation Counsel, Solicitor for The City of New York.

82 (Endorsed:)

County Clerk's Index Number, — Year 191—.

Circuit Court of Appeals for the Second Circuit.

Consolidated Gas Company of New York, Plaintiff-Appellee, against
Charles D. Newton, as Attorney General of the State of New York et al., Defendants-Appellees; The City of New York, Appellant.

Assignment of Errors.

William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Sep. 23, 1919. William Parkin, Clerk.

83 United States Circuit Court of Appeals for the Second Circuit.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee, against
CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Petitioner and Appellant.

Service of a copy of the annexed original citation dated September 23, 1919, and of copies of the assignment of errors, petition, appeal and allowance in the above entitled matter are hereby admitted.

Dated, September 24, 1919.

SHEARMAN & STERLING,
Solicitors for Respondent, Consolidated Gas Company of New York, 56 Wall Street, Borough of Manhatan, City of New York.
CHARLES D. NEWTON,
Attorney General of the State of New York, 57 Chambers Street, Borough of Manhattan, City of New York.
EDWARD SWANN,
District Attorney for the County of New York.
TERENCE FARLEY,
Solicitor for Respondent, Lewis Nixon, Constituting the Public Service Commission for the First District.

84 (Endorsed:)

County Clerk's Index Number, — Year, 191—.

United States Circuit Court of Appeals for the Second Circuit.

Consolidated Gas Company of New York, Complainant-Appellee,

against

Charles D. Newton, etc., et al., Defendants-Appellees; The City of New York, Petitioner and Appellant.

Admission of Service of Citation, etc.

William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Sept. 27, 1919. William Parkin, Clerk.

85 United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; THE CITY OF NEW YORK, Petitioner-Appellant.

Know All Men by These Presents:

That the City of New York, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at 47 Cedar Street, in the City, County and State of New York, as Surety, are held and firmly bound unto the above named Consolidated Gas Company of New York, in the sum of Two Hundred and Fifty Dollars ($250.00), to be paid to said Consolidated Gas Company of New York for the payment of which, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents:

Sealed, with our seals and dated the 30th day of September, in the year One Thousand, nine hundred and nineteen.

Whereas, the above named, The City of New York, has prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered in the above entitled suit by the judgment of the United States Circuit Court of Appeals for the Second Circuit.

86 Now, Therefore, the condition of this obligation is such that of the above named, The City of New York, shall prosecute said appeal to effect and answer all damages and costs of this appeal, if it fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and effect.

THE CITY OF NEW YORK,
By GEO. P. NICHOLSON,
Acting Corporation Counsel of
The City of New York.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-fact.

Attest:
[SEAL.]
ADOLPHUS A. JACKSON,
Attorney-in-fact.

STATE OF NEW YORK,
City and County of New York, ss:

On the 1st day of October, 1919, before me personally came George P. Nicholson, acting Corporation Counsel of The City of New York, Acting head of the Law Department, one of the departments of The City of New York, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and who duly acknowledged to me that he executed the same.

MATTHEW F. DAFFY,
Notary Public, Kings Co. No. 1.

Kings Co. Register's No. 1005.
New York Co. Clerk's No. 5.
New York Co. Register's No. 1125.
Bronx Co. Clerk's No. 9.
Bronx Co. Register's No. 2118.
Queens Co. Clerk's No. 1201.
Term Expires March 30, 1921.

87 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

[Vignette.]

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to b an Attorney-in-fact of the United States Fidelity and Guaranty Com pany, the corporation described in and which executed the annexe bond of The City of New York as surety thereon, who being by m duly sworn, deposes and says that he resides in the City of New Yor State of New York, and that he is the said Attorney-in-fact of the sai United States Fidelity and Guaranty Company, and knows the co porate seal thereof; that said Company is duly and legally incorpo ated under the laws of the State of Maryland; that said Company ha

complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of The City of New York is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such Attorney-in-fact of said Company; and that he is acquainted with Adolphus A. Jackson, and knows him to be Attorney-in-fact of said Company; and that the signature of said Adolphus A. Jackson subscribed to said bond is the genuine handwriting of said Adolphus A. Jackson and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence, this 30th day of September, 1919.

AUGUSTUS WALLAUER,
Notary Public, New York County.

Notary Public, Queens County No. 1983.
Certificate filed in New York County No. 363 Register's No. 1370.
Richmond, Westchester, Nassau, Putnam, Orange, Suffolk & Rockland Counties.
Term expires March 30, 1921.

88 [Endorsed:]

County Clerk's Index Number, — Year 191-.

United States Circuit Court of the U. S. for the Second Dist.

Consolidated Gas Co. of New York, Complainant-Appellee,

against

Charles D. Newton, et al. and Lewis Nixon, Constituting the Public Service Com. for the First District, Defendants-Appellees; The City of New York, Petitioner-Appellant.

Bond on Appeal to the Supreme Court of the U. S.

William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

Approved this 1st day of October, 1919, as a bond for costs.
H. G. Wood, Judge of U. S. Circuit Court of Appeals.
United States Circuit Court of Appeals, Second Circuit. Filed Oct. 1, 1919. William Parkin, Clerk.

89 United States Circuit Court of Appeals for the Second District.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Petitioner and Appellant.

It it hereby stipulated by the attorneys for the parties to the above entitled appeal that the following papers are the portions of the record which shall constitute the transcript of record on appeal herein, to wit:

(1) The order to show cause.

(2) The petition of The City of New York.

(3) The bill of complaint.

(4) The affidavit of R. A. Carter read in opposition to motion.

(5) The opinion of Judge Julius M. Mayer.

(6) The memorandum of Judge Julius M. Mayer made on settlement of order of March 3, 1919.

(7) The order denying the application of The City of New York to intervene.

(8) The assignment of errors on the appeal to the Circuit Court of Appeals.

(9) The petition for appeal to the Circuit Court of Appeals.

(10) The allowance and direction as to bond on the appeal to the Circuit Court of Appeals.

90 (11) The citation on appeal to the Circuit Court of Appeals.

(12) Transcript of the record of the Circuit Court of Appeals showing the affirmance of the order of March 3, 1919, without opinion by said Court of Appeals.

(13) The order for mandate.

(14) Assignment of errors filed with the petition for an allowance of an appeal to the Supreme Court of the United States.

(15) The petition, appeal and allowance thereof to the Supreme Court of the United States.

(16) Citation on appeal to the Supreme Court of the United States.

Dated, New York, September 24, 1919.

WILLIAM P. BURR,
Corporation Counsel and Solicitor for the City of New York.
SHEARMAN & STIRLING,
Attorneys for the Consolidated Gas Company of New York.
TERENCE FARLEY,
Attorney for Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District.
CHARLES D. NEWTON,
Attorney General, State of New York.
EDWARD SWANN,
District Attorney for the County of New York.

91 [Endorsed.]

County Clerk's Index Number, Year 191-.

United States Circuit Court of Appeals for the Second District.

Consolidated Gas Company of New York, Complainant-Appellee,

against

Charles D. Newton, as Attorney General of the State of New York, etc., Defendant-Appellees, The City of New York, Petitioner and Appellant.

Stipulation as to the Transcript of Records.

William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Sept. 27, 1919. William Parkin, Clerk.

92 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 91 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Consolidated Gas Company of New York against Charles D. Newton, as Att'y. Gen'l, etc., et al., as agreed upon by the parties.

In testiomny whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern Dis-

trict of New York, in the Second Circuit, this 1st day of October in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the said United States the One Hundred and Forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

93 UNITED STATES OF AMERICA, *ss:*

To Shearman & Sterling, Esqs., solicitors for complainant, No. 55 Wall Street, Borough of Manhattan, The City of New York; Terence Farley, Esq., counsel to Lewis Nixon, constituting the Public Service Commission for the First District, No. 49 Lafayette Street, Borough of Manhattan, The City of New York; Charles D. Newton, Esq., Attorney General of the State of New York, No. 51 Chambers Street, Borough of Manhattan, The City of New York; Edward Swann, Esq., District Attorney of the County of New York, State of New York, Criminal Court Building, Centre Street, Borough of Manhattan, The City of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 21st day of October, 1919, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The City of New York is appellant, and the Consolidated Gas Company of New York, Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, the Attorney General of the State of New York, and the District Attorney of the County of New York, are appellees, to show cause, if any there be, why the final order or decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. Edward Douglass White, Chief Justice of the U. S. Supreme Court, this 23d day of September, in the year one thousand nine hundred and nineteen.

H. G. WARD,
Judge of the United States Circuit Court of Appeals.

94 [Endorsed:]

United States Circuit Court of Appeals for the Second Circuit.

Consolidated Gas Company of New York, Complainant-Appellee,

vs.

Charles D. Newton et al., Constituting the Public Service Commission of the State of New York, First District, Defendants-Appellees; The City of New York, Petitioner and Appellant.

Original.

Citation on Appeal.

William P. Burr, Corporation Counsel, Office & P. O. Address, Municipal Building, Borough of Manhattan, New York City.

Served by J. Bailey. Date, 9/24/19.

Filed Sept. 27, 1919. William Parkin, Clerk.

[Stamped:] District Attorney's Office, received Sep. 24, 1919.

Endorsed on cover: File No. 27,321. U. S. Circuit Court Appeals, 2d Circuit. Term No. 566. The City of New York, appellant, vs. The Consolidated Gas Company of New York et al. Filed October 10th, 1919. File No. 27,321.

No. 566

IN THE

Supreme Court of the United States.

OCTOBER TERM—1919.

CONSOLIDATED GAS COMPANY,
Complainant-Appellee,

vs.

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District
Defendants,

THE CITY OF NEW YORK,
Appellant.

BRIEF ON APPEAL FROM ORDER DENYING APPLICATION OF CITY OF NEW YORK TO INTERVENE AS PARTY DEFENDANT.

CHARLES D. NEWTON,
Attorney General of the State of New York,
State Capitol,
Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton as Attorney General,
Albany, N. Y.

Stillman Appellate Printing Company, 200 William Street, N. Y. C.

IN THE

Supreme Court of the United States.

CONSOLIDATED GAS COMPANY,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

BRIEF OF DEFENDANT-APPELLEE CHARLES D. NEWTON, AS ATTORNEY-GENERAL.

The application of the appellant, The City of New York, for an order herein, joining the said City as a party defendant was supported by the

undersigned upon the argument in the District Court on the appeal to the Circuit Court of Appeals and he remains of the opinion that such relief should be granted.

POINT I.

The City of New York is an interested party in the litigation.

The interest involved is primarily a local one. Because of the broad, sweeping provisions of the New York Statute (Code of Civil Procedure, Sec. 1962) (Sec. 68 of the Executive Law), in the event of a violation of the Law by the complainant, it would become the duty of the Attorney-General to bring action to recover the prescribed penalty. The People of the State at large, however, have no interest in the litigation other than the general interest they have in compelling observance of all laws by corporations to which franchises have been granted.

The complainant exercises its franchise solely within the City of New York. If the complainant be successful in maintaining this action, only those persons who consume gas within the City of New York will be affected thereby. The Statute fixing the price of gas at Eighty Cents within the City of New York was enacted by the State Legislature at the request of the people of the locality affected, as a Local Bill, and as such received the approval of the Mayor of the City of New York.

The nullification of this Statute would have a far reaching influence upon the City. An increase in the price of gas would result in an increase in the expense of operating every residence, every office building and factory, affect the value of real estate and hence ultimately affect local taxation.

Strictly speaking, what the complainant seeks in this action is to restrain the defendants from enforcing the law. It is the contention of complainant that since the City has no power of enforcement it is an intruder, without warrant, in the controversy. The Court, cannot, however, shut its eyes to the somewhat broader aspects of the situation. The City as a municipal corporation has its origin in the desire and purpose of the citizens residing within it to act collectively for their own general welfare. The service furnished by the complainant is of so general a character that practically every citizen is affected thereby. The State law so far recognizes the need of an agency through which the citizens may act collectively, for their protection in gas rate matters, that it provides for the filing of a complaint relative to such rates by the Mayor of the municipal corporation. It is surely not illogical to carry the reasoning a bit further and to determine that if the citizens desire to defend their interests by means of the collective agency through which they are accustomed to act, they should be permitted to do so.

No State agency can command the degree of confidence on the part of the citizens that a local agency can, when such local agency is wholly within the control of the citizens.

On February 14, 1920, after the record in this case was filed, Mr. Justice Greenbaum in the Supreme Court of New York in the case of Jamaica Gas Light Co. vs. Nixon *et al.* held, upon an application of the City of New York to intervene in a case similar to that at bar attacking the constitutionality of the same law as that attacked in this case, that the City of New York is a necessary and proper party in a suit of this kind, and that pursuant to Section 255 of the Greater New York Charter the Corporation Counsel has a specific legal duty to defend the "right and interests * * * of the People of the City of New York."

This decision, while not published in the reports, will be found in the New York Law Journal of February 14, 1920.

POINT II.

Equity Rule 37 confers discretion on the Court to allow The City of New York to intervene.

Equity Rule 37 was obviously intended to grant to the Court broader powers than had theretofore been exercised by the Court in matters of intervention. It should be interpreted in a liberal spirit.

Reading the entire rule with all of its subdivisions its clear intent seems to be to confer power on the Court in its discretion and in order that the ends of justice may be attained, to permit the intervention of "All persons having an interest in the

subject of the action" and "Anyone claiming an interest in the litigation."

Dated New York, April 7th, 1920.

Respectfully submitted,

CHARLES D. NEWTON,
Defendant,
Attorney-General of the
State of New York.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton as
Attorney General,
Capitol, Albany, N. Y.

ROBERT S. CONKLIN,
Deputy Attorney-General,
Of Counsel.

No. 566

New York Supreme Court,

NEW YORK COUNTY.

THE JAMAICA GAS LIGHT COMPANY,
Plaintiff,

against

LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District; DENIS O'LEARY, as District Attorney of the County of Queens; CHARLES D. NEWTON, as Attorney General of the State of New York; and THE CITY OF NEW YORK,
Defendants.

OPINION OF MR. JUSTICE SAMUEL GREENBAUM RENDERED IN THE ABOVE ENTITLED ACTION ON FEBRUARY 13, 1920.

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York,
State of New York.

Submitted on argument of Consolidated Gas Company of New York vs. Charles D. Newton and others
April 19th, 1920.

Stillman Appellate Printing Company, 200 William Street, N. Y. C.

Opinion of Mr. Justice Samuel Greenbaum, rendered in the Supreme Court of the State of New York, taken from New York Law Journal of February 14th, 1920.

Decided February 13th, 1920.

"Jamaica Gas Light Co. vs. Nixon *et al.*, &c.—The City of New York moves to intervene as a party defendant in the above entitled action. The action is brought to test the constitutionality as to the plaintiff of chapter 125 of the Laws of 1906, wherein it is provided *inter alia* that a corporation engaged in the business of selling or furnishing illuminating gas in the Fourth Ward of the Borough of Queens, in the City of New York, shall not charge or receive a sum in excess of $1 per 1,000 cubic feet of gas. The plaintiff, in opposing this motion, relies upon the opinion of Mayer, J., filed February 24, 1919, in Cons. Gas Co. of N. Y. v. Chas. D. Newton, as Attorney-General of the State of New York *et al.*, in a suit pending in the United States District Court for the Southern District of New York, in which a similar motion for intervention on the part of the City of New York was denied. A study of that opinion discloses that the court reached its conclusion upon the construction which it gave to the Federal Equity Rule 37, which treats of parties

in equity suits. The learned Court there held that the City of New York did not have such a "legal interest" as was contemplated under Rule 37, and therefore was not entitled to intervene. This Court, however, is obliged to determine the right of intervention under the provisions of the Code of Civil Procedure. It thus becomes necessary to determine the effect to be given to the relevant section of the Code affecting the rights of the parties upon this motion. Section 452 provides: "The Court may determine the controversy as between parties before it, where it can do so without prejudice to the rights of others or by saving their rights, but where a complete determination of the controversy cannot be had without the presence of other parties the Court must direct them to be brought in. And where a person not a party to the action has an interest in the subject matter thereof * * * and makes application to the Court to be made a party, it must direct him to be brought in by the proper amendment." The vital question therefore is, Has the City of New York such an interest in the subject of this action as to come within section 452 of the Code? At the outset it is proper to note that the complaint in this action differs from that in the Consolidated Gas Company case (*supra*) in two respects: First, in the instant case it is alleged that the plaintiff "owns and possesses a perpetual and indefeasible interest in the lands constituting the streets and highways of said former village, in which its mains are laid." The City of New York is the trustee of the people in respect of the streets and highways within its territorial limits, and is also the owner in fee simple absolute of many streets,

highways and avenues of the city. It also alleges that chapter 125 of the Laws of 1906 "impairs the obligation of the plaintiff's contracts with the City of New York and the municipality." No such allegations appear in the bill of complaint in the Consolidated Gas Company case. It may be that an issue may be tendered in this action respecting plaintiff's contracts with the City of New York, which makes it proper to permit the municipality to intervene. In this connection it may also be observed that the concluding paragraphs of the opinion of the learned Court in the Consolidated Gas Company case (*supra*) stated that in all the cases cited by the defendants the City of New York had a legal interest either "because a legislative act directly affecting it was attacked, or because, by reason of some franchise or some statutory provision the city had an interest or duty as matter of law." This would seem to indicate that the attention of the Court was not called either to the fact that the legislative act here assailed was one that affected the City of New York, or to the various statutory provisions to which reference will presently be made. Before chapter 125 of the Laws of 1906, which is the legislative act herein attacked, became a law, it was referred to the City of New York for acceptance or rejection, in accordance with the mandatory provisions of article 12, paragraph 2, of the state constitution, which imposes the duty upon the state Legislature to refer all bills "affecting property, affairs or government of cities" to it for acceptance or rejection. It thus appears that chapter 125 of the Laws of 1906, although applicable solely to private consumers in the City of

New York, was nevertheless referred to the city, for the ostensible reason that it was a bill which related to "affairs" of the city within the meaning of the state constitution, and that after its acceptance by the city it became a law. By chapter 429 of the Laws of 1907 the Legislature created a public service commission, and invested it with the powers of the commission of gas and electricity, which had been created by chapter 737 of the Laws of 1905. Chapter 604, Laws of 1916, which amended chapter 125 of the Laws of 1906, also became a law only after its acceptance by the City of New York, thus again evidencing the fact that the City of New York was recognized by the Legislature as having an interest in the matter of gas rates affecting consumers in the City of New York and that notwithstanding there then existed a Public Service Commission, which was charged with active duties which included matters pertaining to the manufacture and distribution of gas. It should also be borne in mind that the determination of the constitutional question presented in this action necessarily involves findings of fact touching the reasonable cost of production and distribution of gas. If it be found that the cost of manufacturing and distributing the gas is more than 75 cents per 1,000 cubic feet, which is the rate fixed by chapter 736 of the Laws of 1905 for gas furnished to the city, the latter might be greatly embarrassed in any subsequent action assailing the constitutionality of that law, even though a decree may not be *res adjudicata* as to it in the present action. As bearing upon the question under discussion consideration should be given to the provisions of what is known

as the Home Rule Law, being chapter 247 of the Laws of 1913. It is there provided, among other things, that the city has power to "maintain order, enforce laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto." Section 21 of the Home Rule Law defines the general meaning of the term "general welfare" in that act as including "health, safety, comfort and convenience." The comfort and convenience of the people of the City of New York would be seriously affected if the heating and illuminating qualities of the gas are not up to the legal standard. In section 469 of the Greater New York Charter power is conferred upon the commissioner of water supply, gas and electricity to inspect and test "gas and electricity used for light, heat and power purposes." It appears in the moving affidavits that the city maintains at considerable expense stations for testing the quality and pressure of gas furnished throughout the city to the private consumer for the purpose of determining whether the consumer is obtaining the standard of gas prescribed by law. Consideration should also be taken of the provisions of section 71 of the Public Service Commissions Law, which expressly authorizes the commission to receive and consider the complaint of the Mayor of the City of New York as to the price, pressure, purity and quality of the illuminating gas furnished to the people of the city. In this connection we may quote from International Railway Company vs. Rann (224 N. Y., 83): "A municipal corporation consists, however, of both territory and inhabitants. As a legal conception the corporation is an entity

distinct from its inhabitants, but it remains a local community, a body of persons, the sum total of its inhabitants and the proper custodian and guardian of their collective rights." We also find in section 255 of the Greater New York Charter, as amended by chapter 466 of the Laws of 1901 and chapter 602 of the Laws of 1917, that "the corporation counsel, except as otherwise herein provided, shall have the right to * * * defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or any part or portion thereof or of the people thereof * * *." We thus find a specific legal duty devolving upon the corporation counsel to defend the "rights and interests * * * of the people" of the City of New York. It cannot be gainsaid that the people of New York have a vital collective interest in the determination of the issues involved in this action. It is claimed that the Public Service Commission is the legal defender of the rights of the people with respect to such a question as is involved in this action. As a matter of fact we also find that the district attorney as well as the attorney-general of the state have special duties to perform in enforcing the laws regulating the price and quality of gas. The Public Service Commission is a state body, and is not exclusively or specially vested with the duty of safeguarding the interests of the people of the City of New York. The obligations placed upon the Public Service Commission are not inconsistent with those which devolve upon the City of New York as custodian of the rights of the people entitling it to join in the defense of this action. It seems to the Court that in view of all the considerations above set

forth, the City of New York has such an interest in litigating the questions involved in this action as fairly to bring it within the provision of section 452 of the Code so as to constitute it a proper, if not indeed a necessary, party thereto, and to justify the exercise of the Court's discretion in granting the motion."

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 566.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

MEMORANDUM FOR COMPLAINANT, IN OPPOSITION TO MOTION TO ADVANCE.

Motion by the City of New York to advance the argument of an appeal (taken in September, 1919) from an order of the Circuit Court of Appeals,

Second Circuit, unanimously affirming an order of the District Court which denied the application of the City for leave to intervene.

On October 6, 1919, the City applied to this Court for a writ of *certiorari* to review the said order from which the said appeal had previously been taken. The application was denied by this Court on October 20, 1919.

The suit was brought by the complainant, the Consolidated Gas Company of New York, to have the so-called Eighty-cent Act (L. 1906, Ch. 125), which limits the price of gas to be charged to private consumers in the City of New York to eighty cents per thousand cubic feet, declared void, on the ground that the rate is confiscatory and therefore deprives the complainant of its property without due process of law.

POINTS.

FIRST.

The public interest already completely represented and protected.

All parties charged with the duty of upholding the Eighty-cent Act (L. 1906, Ch. 125), which is attacked in this litigation, are already before the Court: the Public Service Commission, the Attorney General and the District Attorney of New York County.

I. As pointed out in our brief submitted on October 6, 1919, in opposition to the application herein of the City of New York for a writ of *certiorari*, there are two Public Service Commissions in the State of New York: one for the First District, comprising the City of New York, and the other for the remainder of the State. Absolute power of regulation and enforcement of the law is conferred upon the Commission (L. 1907, Ch. 429, as amended; see Appendix, *post*, p. 13).

The Commission is, therefore, the sole body charged with the duty of representing the consumers in the City of New York.

In re Engelhard, 231 U. S. 646.

II. The Attorney General is required by law to appear in all cases involving the constitutionality of an act of the legislature; and the Eighty-cent Act is assailed on the ground that it is unconstitutional.

Executive Law, Sec. 68 (Appendix, *post*, p. 14).

III. The District Attorney of the County in which a suit is triable is charged with the duty of enforcing the penalties prescribed by the statute.

Code Civ. Pro., Sec. 1962 (Appendix, *post*, p. 15).

IV. All of the said officials are parties defendant herein and have taken an active part in the defense of this suit (*post*, p. 11).

SECOND.

The City already represented in the litigation.

After the District Court had denied the application of the City to intervene, the Corporation Counsel of the City, in his official capacity, was substituted as solicitor for Mr. Swann, the District Attorney. A motion by the complainant to set aside the order of substitution was denied, on the ground asserted by the City, that the Corporation Counsel had undoubted power to appear for the District Attorney. Extracts from the affidavit of the Corporation Counsel, claiming this right, are given in the annexed affidavit of Mr. Vilas (*post*, pp. 9-10); which also shows that since then, the City, through its Corporation Counsel, has been continuously active in taking a prominent part in the defense, not only in the cross-examination of the complainant's witnesses, but also in employing accountants, engineers and expert witnesses of its own. The question of the right of the City to intervene has, therefore,

become academic; and the suggestion made to this Court, that the cause should be advanced so as to enable the City to take part in the litigation before its conclusion, is lacking in candor. This is all the more evident in the fact that the City took an appeal to this Court in September, and *thereafter* applied for a writ of *certiorari,* and that it has delayed making the present application to advance until almost the close of the trial. The hearings before the Special Master commenced in July, last, and have proceeded almost continuously since then. The complainant closed its case on December 23, 1919 (Moving Papers, p. 12). The defense has since then proceeded continuously; and it is expected that the trial will be concluded about the middle of February (*post,* p. 11).

THIRD.

Frivolous character of the application.

If the City was not a *necessary* party to this litigation, that is, if the order denying its application to intervene did not deprive it absolutely of a right which it could not otherwise protect, the order was not final and, therefore, is not appealable. The only pretense of such a right is that, under another statute (L. 1905, Ch. 736), the price of gas to the City is limited to seventy-five cents, and that if the Eighty-cent Act in favor of the private consumers should be declared void, the Seventy-five-cent Act *might* be attacked by the Company some time in the future and the City *might* be prejudiced in maintaining it!

I. The record on appeal expressly shows that the Company has no intention of attacking the Seventy-five-cent Act (Record, p. 18). Moreover, the validity of that Act was determined by this Court in the previous litigation, in which the City was made a party for the reason that the validity of that Act was then assailed.

Willcox *v.* Consolidated Gas Co., 212 U. S. 19.

A decision in the present case in favor of the Gas Company, which would enable it to establish a rate to its private consumers permitting an adequate return on its investment, would make it absolutely impossible for the Company, under the previous decision of this Court (212 U. S. 54), to question the seventy-five cent rate.

The contention of the City has not even the basis of the personal interest which might prompt any one of the 500,000 individual consumers of the Company (Record, p. 15) to intervene.

II. If the City was not a *necessary* party to the litigation (which is not pretended), then its application to intervene was within the discretion of the District Court; and its decision will not be reviewed by this Court, even if the lower Court treated the question as one of right and not of discretion.

Credits Commutation Co. *v.* U. S., 177 U. S. 311, 315.

III. The statement in the moving papers (p. 12), that other suits are pending, in which the City would like to intervene, further exposes the trivial character of the present motion. No attempt is made to state what the issues in those cases are,

nor who are the parties, nor whether the Seventy-five-cent Act is or could be attacked, nor whether the suits are of such a character that the court would be justified in exercising its discretion in favor of the application, and not even that the City has any right to intervene or any personal or public interest to protect.

FOURTH.

The application to advance should be denied.

Washington, January 26, 1920.

JOHN A. GARVER,
Counsel for appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 566.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

Affidavit of Ch
A. Vilas
in opposition
tition to adv

STATE OF NEW YORK, }
County of New York, } ss:

CHARLES A. VILAS, being duly sworn, says:

1. I am an attorney and counselor-at-law, associated with the firm of Shearman & Sterling, solicitors for the complainant herein; and I am familiar with all the proceedings which have been had in this suit. I have read the petition of the City of New York to advance this cause, dated January 12, 1920.

2. After the application of the City of New York for leave to intervene herein had been denied by the District Court, the Corporation Counsel of said City was substituted, as such, as solicitor for the defendant, Edward Swann, District Attorney for the County of New York. This substitution was effected by an order, dated May 15, 1919, two months before the trial of the suit was commenced before the Special Master. The complainant moved to vacate the substitution; but, upon the Corporation Counsel's affidavit that it was his duty, *as attorney and counsel for the City of New York,* to appear for the District Attorney, the motion was denied, on June 6, 1919; and the Corporation Counsel has ever since continued to act as solicitor for the defendant, Swann, in this suit.

3. In its petition on this motion, the City of New York, through its Corporation Counsel, alleges, in effect (p. 7), that the defendant, Swann, as District Attorney of the County of New York, has no substantial interest in this action and is really a necessary party only through a "statutory accident". It is, therefore, apparent that it did not cause its Corporation Counsel to be substituted as solicitor for the District Attorney merely for the purpose of protecting his interests in the litigation. The real purpose of the substitution was to permit the City, although held by the Court not to be a proper party, to defend the action as fully as if it were a party; and this is shown by the following extracts from the affidavit of the Corporation Counsel, filed in opposition to the complainant's motion to vacate the substitution:

> "Deponent alleges that the responsibility of defending said action and appearing in behalf of said District Attorney herein is within his

duty as attorney and counsel for The City of New York, its officers and agents, and the officers of the counties embraced in said City."

* * * * *

"That under the direction of your deponent, a large number of cases affecting the rates at which various public services are performed in The City of New York have been conducted by the office of the Corporation Counsel before the Public Service Commission of the First District and before the Supreme Court of the State of New York in the counties of Kings, Queens, New York and of the Bronx. Prominent among these cases are those affecting the rates of the Newtown Gas Company, the Woodhaven Gas Company, the Brooklyn Borough Gas Company, The Bronx Gas and Electric Company and the Kings County Lighting Company. That by reason of the connection of the said Corporation Counsel's office with these cases, deponent has trained a number of experts who are very proficient in this branch of litigation. The services of these men are available in the conduct of the case at bar without expense to the taxpayers other than the regular compensation of said City employees. That, moreover, the office of the Commissioner of Accounts, which is an office provided by the Greater New York Charter, is available to your deponent for the purpose of making investigations as to the accounts of the complainant and as to its operating expenses."

4. Since the first day of the trial of this suit, which commenced on July 22, 1919, and has since proceeded almost continuously, the record now comprising more than ten thousand (10,000) pages, exclusive of exhibits, the Corporation Counsel has been represented at every session by Mr. John P. O'Brien, one of the Assistant Corporation Counsel, who has appeared for the City in all recent rate

cases to which it has been a party. Mr. O'Brien has taken a very active and the most prominent part in the defense of the present suit, has cross-examined the witnesses for the complainant at great length and is now examining witnesses on behalf of the defense. The City has also employed accountants, engineers and expert statisticians, who have assisted the Corporation Counsel in connection with the defense, and who are now preparing to appear as witnesses. Mr. Terence Farley, the solicitor for the defendant, Lewis Nixon, constituting the Public Service Commission for the First District, and the defendant most vitally interested in the suit since he is the public officer who is charged by law with the duty of enforcing the provisions of the statute under attack, has consumed probably not more than one-third as much of the time of the Court as has Mr. O'Brien; and this is also true of the Attorney General.

5. The complainant rested its case on December 23, 1919; and the defendants have since been continuously engaged in presenting their defense; and the sessions have frequently occupied as much as six hours a day. In my judgment, it is probable that the trial will be completed about the middle of February.

6. The order of the Circuit Court of Appeals, affirming the order of the District Court denying the application of the City to intervene, was made on July 19, 1919.

The appeal to this Court from the said order was taken by the City of New York on September 23, 1919.

7. Annexed hereto, marked "Appendix", are correct extracts from the statutes of New York, show-

ing the powers conferred and the duties imposed upon the Public Service Commission, the Attorney General and the District Attorney, in cases of this kind.

The application for a writ of *certiorari* to review the said order was made to this Court on October 6, 1919, and was denied on October 20, 1919.

CHARLES A. VILAS

Sworn to before me,
January 22, 1920.

FREDERIC N. GILBERT
Notary Public, Westchester County
Certificate filed in New York County
New York County Clerk's No. 101.
New York Register's No. 1231

Appendix.

1. Extracts from Public Service Commission Law.

(L. 107, Chap. 429, as amended.)

Section 3. *Public service districts.*—There are hereby created two public service districts, to be known as the first district and the second district. The first district shall include the counties of New York, Bronx, Kings, Queens and Richmond. The second district shall include all other counties of the state.

Section 74. *Summary proceedings.*—Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circum-

stances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief."

2. EXTRACT FROM EXECUTIVE LAW.

Section 68. *Attorney General to appear in cases involving the constitutionality of an act of the legislature.*—Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question to serve notice thereof on the attorney general and that the attorney general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney general to appear in such action or proceeding in support of the constitutionality of such statute.

3. EXTRACT FROM CODE OF CIVIL PROCEDURE.

Section 1962. *Action for forfeiture, etc.*— Where real or personal property has been forfeited, or a penalty incurred, to the people of the State, or to an officer for their use, pursuant to a provision of law, the attorney general, or the district attorney of the county in which the action is triable, must bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought in either, at the election of the attorner general or district attorney. A recovery in such an action bars a recovery in any other action brought for the same cause.

No. 566

IN THE

Supreme Court of the United States

October Term—1919

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,
against

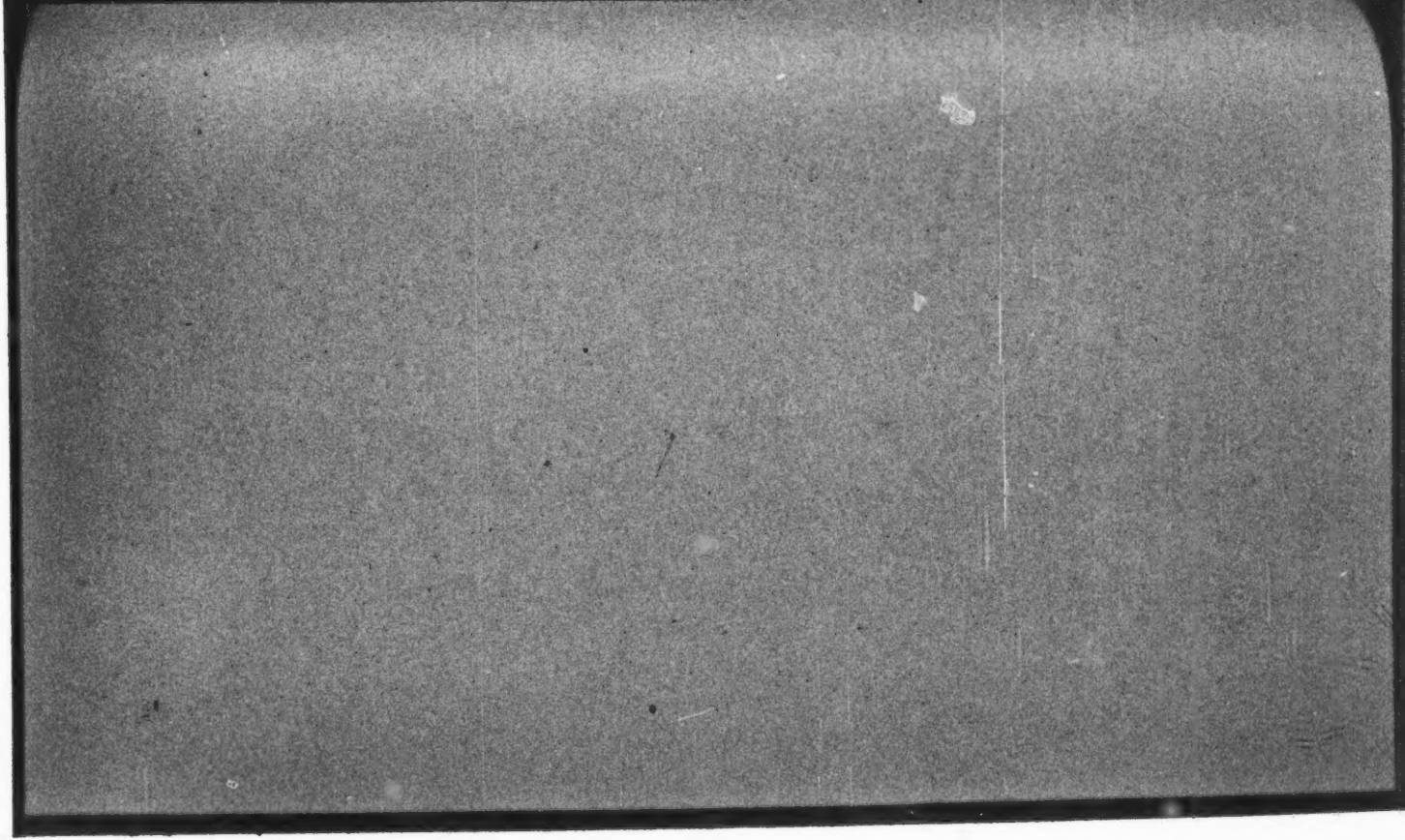
CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

Brief on Behalf of The City of New York

WILLIAM P. BURR,
Corporation Counsel and Solicitor for Appellant,
Municipal Building,
New York City.

Ingle, Inc., 165 William Street



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List of Cases.

List of Text Books.

Charters.

Rule.

Appendix.

IN THE

Supreme Court of the United States

October Term—1919.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,

Defendants,

THE CITY OF NEW YORK,
Appellant.

BRIEF ON BEHALF OF THE CITY OF NEW YORK.

Statement.

This is an appeal to the Supreme Court to review an order of the Circuit Court of Appeals dated July 7, 1919, and filed and entered July 18, 1919, affirming an order of the District Court of the United States for the Southern District of New York, dated March 3, 1919, denying, as a matter of law, an application of The City of New York for leave to intervene as a party defendant in the above-entitled action commenced on January 16,

1919, in the said District Court of the United States for the Southern District of New York, and brought to have declared unconstitutional Chapter 125 of the Laws of the State of New York of 1906, providing a rate for gas sold to private consumers of 80 cents per one thousand cubic feet within the certain portions of The City of New York, because in contravention of the 14th Amendment of the Constitution of the United States and Section 10, Article I of the United States Constitution. A copy of Chapter 125 of the Laws of 1906 is annexed to this brief (see page 47).

The relief prayed for in the bill of complaint in this action specifically reads as follows:

> "1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.
>
> 2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.
>
> 3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

Chapter 125 of the Laws of 1906, the constitutionality of which was questioned by this suit, related solely to the affairs and government of the City of New York and was *accepted by said City*, under the provisions of Article XII, Section 2, of the State Constitution.

A history of the Consolidated Gas Company of New York, taken from Poor's Manual of Public Utilities (1918, page 1417) is attached to this brief (see page 67).

The City of New York was not made a party to this suit.

The price of gas supplied to The City of New York was and now is fixed at 75 cents per thousand cubic feet by another act, which applies exclusively to The City of New York, to wit: Chapter 736 of the Laws of 1905. A copy of this act is annexed to this brief (see page 49).

Charles D. Newton, as Attorney General of the State of New York, was made a party and considered a party necessary to a complete determination of this cause for the reason that, by virtue of Section 1962 of the Code of Civil Procedure (a copy of which is annexed to this brief—see page 64), it is within the power and it is the duty of the Attorney General to set in motion proceedings for the recovery of the penalties prescribed by the said statute whenever an attempt is made to charge more than the letter of the statute permits, and, under Section 68 of the Executive Law, the Attorney General is the officer charged, under the procedure there set forth, with the duty of defending the constitutionality of statutes. For these reasons he is a necessary party-defendant, and the determination would not be complete without his presence.

Edward Swann, as District Attorney of the County of New York, was made a party for the reason that he is also an officer charged under said Section 1962 of the Code of Civil Procedure with the power and duty

of bringing an action to recover the penalties provided by said Chapter 125 of the Laws of 1906.

The provision of said Chapter 125 of the Laws of 1906 relating to *penalties* has been practically held unconstitutional by the Supreme Court of the United States. As to these penalties, Mr. Justice PECKHAM, delivering the opinion of the Supreme Court in *Consolidated Gas Company* v. *Wilcox, as Chairman, etc., and others* (212 U. S., 19), said, in part:

> "We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the court below, they are undoubtedly void within the principle decided in *ex parte Young* (209 U. S., 123, and the cases there cited), because so numerous and overwhelming in their amount."

It appears from an affidavit of said Edward Swann, filed in this suit with the Clerk of the District Court, that the office of the District Attorney of the County of New York is not equipped to undertake the defense of a suit of this character and that the office of the District Attorney of the County of New York is concerned primarily with the prosecution of criminal offenses, and it further appears that the District Attorney of the County of New York is a necessary defendant in the above-entitled suit largely because of what might be called a statutory accident. (See opinion herein of Judge JULIUS M. MAYER, transcript of record, page).

The defendant Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, was made a party to this cause of action for

the reason that it is provided by Section 74 of the Public Service Commission Law (Chapter 429 of the Laws of 1907) (a copy of this section is annexed to this brief—see page 52, (that whenever the said Commission shall be of opinion that a gas company is failing or omitting to do anything required by law, or is doing anything contrary to or in violation of law, the said Commission shall direct their counsel to begin proceedings in the Supreme Court of the State of New York to have such action prevented by injunction or mandamus.

The Legislature passed in 1907 Chapter 429 of that year, which is entitled:

> "AN ACT to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor."

Section 2 of Article XII of the Constitution of the State of New York above mentioned classifies cities, defines *general and special city laws*, and provides for the acceptance of laws relating to the *property affairs* and *government* of cities by the Mayors of such cities. A copy of said Section 2, Article XII, of the Constitution of the State of New York is attached to this brief (see page 50).

The Legislature passed in 1913 Chapter 247 of that year, known as the "*Home Rule Law.*" A copy of this law is attached to this brief (see page 53).

Also in the year 1913 the Legislature passed Chapter 442 of that year, amending the "Executive Law" by adding Section 68 thereto, upon which considerable reliance is placed by the complainant. A copy of said Chapter 442 of the Laws of 1913 is attached to this brief (see page 62).

The Consolidated Gas Company of New York, complainant in said suit, commenced another action on May 1, 1906, to have declared unconstitutional on the same grounds both said acts, namely, Chapter 125 of the Laws of 1906, and Chapter 736 of the Laws of 1905, *and to this suit The City of New York was made a party defendant* and defended the same and thereafter the Supreme Court in the year 1908, sustained said acts as constitutional and valid. The mandate from the Supreme Court of the United States in said suit, dated January 4, 1909, provided in part:

> "And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to dismiss the appeal without prejudice."

The decree, dated February 13, 1909, entered on said mandate, provided, in part, as follows:

> "FIRST: That the judgment of the United States Supreme Court be and the same hereby is made the judgment of this court, and that the decree of this court entered herein on the 3d day of April, 1908, in favor of complainant be reversed;
>
> SECOND: That the bill of complaint herein be and the same hereby is dismissed without prejudice, with the reservation aforesaid."

See

William R. Willcox, *et al.*, constituting the Public Service Commission of the State of New York for the First District, and others, Appellants,

against

Consolidated Gas Company of New York, 212 U. S., 19.

On January 29, 1919, the Corporation Counsel of The City of New York moved by petition and order to show cause before Hon. JULIUS M. MAYER, *District Judge,* for the Southern District of New York, for permission to intervene in said *second* action *so commenced January 16, 1919,* as a party defendant, which application was denied and an order was entered, dated March 3, 1919, reading, in part, as follows:

> "Order, adjudged and decree, that the said motion to intervene be and the same hereby is denied *as matter of law,* and the said petition of The City of New York be and the same hereby is dismissed, the court not passing on the matter as one of discretion, because not necessary at this time, but reserving the right so to do if in error as to the law."

The City of New York was allowed on May 29, 1919, an appeal from said order of March 3, 1919, to the Circuit Court of Appeals for the Second Circuit which confirmed said order.

The contentions of The City of New York are:

First: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming the order of March 3, 1919, of the District Court of the United States for the Southern District of New York, for an order permitting it to intervene as a party defendant in this litigation and also in refusing to reverse said order of March 3, 1919, of the District Court of the United States for the Southern District of New York, filed and entered herein ... March 3, 1919.

Second: The Circuit Court of Appeals of the United States for the Second Circuit erred in coofirming said order of the District Court and in thereby holding that The City of New York in the previous litigation herein

was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

Third: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that every officer or public body who or which is charged by law with a duty in respect of the defense of the 80-cent gas statute of this law suit has been made a party defendant.

Fourth: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that The City of New York is not a proper party defendant within the meaning of Equity Rule 37.

Fifth: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that The City of New York is not a necessary party within the meaning of Equity Rule 37 and to this litigation.

Sixth: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that the City of New York is not interested in this litigation within the meaning of said Equity Rule 37.

In support of these contentions, The City of New York respectfully urges the following

POINTS

I.

Interested, as it is, in upholding the validity of a special city law, which was passed, at its request, for the benefit of its inhabitants, and representing, as it does, its taxpayers, many of whom are the respondent company's consumers, The City of New York is vitally interested in the result of this litigation.

(1) The status of The City of New York.

If The City of New York be compelled, by the constitutional provisions, a copy of which we have attached to this brief, to grant or withhold its acceptance of any City bill, which refers particularly to it, how can it be claimed, with any show of reason, that it is not interested in defending such a bill and establishing its validity? What greater interest has the Attorney General or the District Attorney of the County of New York than The City of New York in upholding such legislation? To quote the language of Judge POUND in

Matter of International Ry. Co. v. *Rann*, 224 N. Y., 83, 89:

> "The substantial rights (of the municipality) are the rights of the inhabitants of the city, not of the civil division of the state which exists for governmental and public purposes. A municipal corporation consists, however, of both territory and inhabitants. As a legal conception, the corporation is an entity distinct from its inhabitants, but it remains a local community; a body of persons; the sum total of its inhabitants and *the proper custodian and guardian of their collective rights.*"

Chapter 125 of the Laws of 1906, is a special City law relating to the "*property, affairs or government*" of The City of New York within the meaning of Article XII, Section 2 of the Constitution of the State of New York, and for this reason it would *not have been valid* if it were not accepted by The City of New York and for the very reason it is endorsed "*accepted by the City of New York.*" Then does it not follow that the city is both a necessary and proper party in an action brought to have this Act declared invalid.

The rate of gas is a matter of municipal interest.

Mr. Justice RODENBECK, sitting in the Monroe County Special Term of the Supreme Court, in June, 1916, had before him a question whether a limitation of street railroad fares to five cents was "germane to the governmental powers and function of a city." (See *Willis against City of Rochester*, 95 Misc., 686, affirmed in 219 N. Y., 427.) This case involved the constitutionality of a local act of the Legislature of the State of New York which amended the charter of the City of Rochester so as to bring certain adjacent territory within the city limits and provided that a corporation operating a street surface railroad shall not charge any passenger more than five cents for a continuous ride within the limits of the city as thus enlarged. An attack was made upon this act, on the ground that the inclusion of such a limitation on fares in the city charter violated the constitutional provisions against the joining of matters of general legislation with provisions of private and local bills. The honorable Court said that

> "the answer to this question depends upon whether or not the regulation of street railroads, and particularly the *fixing of fares* to be charged, comes

within the subjects which *properly are or may be made a matter of municipal regulation or control.* Is the *regulation* of street railroads *so far as the city is concerned* 'a matter which may be required for the preservation of peace, good order and health within its limits, the promotion of its growth and prosperity and the raising of revenue for its government'? (*Louisiana* v. *Pilsbury,* 105 U. S., 278-289). If their regulation comes within any of these purposes, *provisions relating to fares* may be included in an act creating a city or one amending its charter generally. It seems to me that upon principle and upon the adjudicated cases the question must be answered in the affirmative." (Italics are ours.)

Citing:

Public Service Comm. v. *Westchester Street Railway Co.,* 206 N. Y., 209;
Willcox v. *Richmond Light and R. R. Co.,* 142 App. Div., 44, aff'd 202 N. Y., 515, and other cases.

His conclusion was that the legislative power had not been exceeded because exercised in a local act confined to matters relating to the city, the establishment of maximum fares on railroads within the City being a municipal purpose.

Only one Judge dissented from the affirmance of this case in the Court of Appeals. The opinion of the Court, per POUND, *J.*, held that "*The rate of fare is a matter of municipal and public interest.*"

In *Willis* v. *City of Rochester* (*supra*), Judge RODENBECK further said:

"The regulation of the conduct of street railroads, with such general limitations as may be imposed, are as much a *municipal purpose* and the

> *subject of municipal regulation and control* as are such matters as the supply of water, the lighting of streets, the disposal of sewage and garbage and the *numerous other matters which affect the peace, health, comfort or convenience of the members of the corporation.* The regulation of a railroad in a city may affect very seriously, not only the *convenience of the inhabitants* but the *growth and development of the city,* and *is, therefore, a matter of grave municipal concern,* particularly since the construction of a railroad in a street or highway acts substantially as a monopoly of the right to use that street or highway for such purposes." (Italics are ours.)

The same principle would apply to the regulation of the rate of the Consolidated Gas Company, by Chapter 125 of the Laws of 1906, which is, in the words of Judge RODENBECK, "*a matter of grave municipal concern to the City of New York.*"

In *Public Service Commission* v. *Westchester Street Railway Company* (206 N. Y., 209), where the municipality had made the observance of a 5-cent fare a condition of its consent and the company later tried nevertheless to charge more, the Court of Appeals said:

> "There is no doubt that the *rate of fare* to be charged to and from points in the village was a matter of such *municipal* and *public interest* that the municipal authorities might bargain with reference thereto."

In *Sun Printing and Publishing Association, et al., appellants, against the Mayor, Aldermen and Commonalty of the City of New York, the Board of Rapid Transit Railroad Commissioners, in and for the City of New York, et al., respondents,* decided March 23, 1897 (152 N. Y., 257), the Court of Appeals had before it the question

whether Chapter 4 of the Laws of 1891, as emended providing for the construction by the City of a rapid transit route, was constitutional, and the immediate question for the Court to decide was whether the construction of such a rapid transit route by the City was a *"City purpose."* This question was decided by the Court of Appeals in the affirmative in an elaborate opinion, in which Judge HAIGHT said:

> *"They are necessary for the common welfare of the people, required for their use, public in character and authorized by the Legislature, and when constructed and owned by the City are for a 'city purpose' within the meaning of the Constitution."*

Judge HAIGHT, in his opinion, cites many cases, among them, *People* v. *Kelly*, 76 N. Y., 475, where it was held that the construction of a bridge joining the City of Brooklyn and the City of New York was a *"city purpose."* In this case, Judge EARL (pp. 487-489) said:

> "On the contrary it would be a 'city purpose' to purchase a supply of water outside of a city, and convey it into the city, and for such a purpose a city debt could be created. So lands for a park for the health and comfort of the inhabitants of a city could be purchased outside of a city limits, and yet conveniently near thereto. *Such improvements are for the common and general benefit of all the citizens, and have always been regarded as within the scope of municipal government;* and so to highways or streets leading into a city or village may be improved, provided the improvements be confined within such limits that they may be regarded as for the *common benefit and enjoyment of all the citizens."*

In *Matter of Application of Mayor*, 99 N. Y., 569, Judge FINCH had before him the question whether the

construction of Pelham Park by the City was a "city purpose." Among other things, he said (see p. 585):

> "The purpose must be primarily the *benefit or convenience of the City as distinguished from that of the public outside of it,* although they may be incidentally benefited, and the work be of such a character as to show plainly a predominance of that purpose. And then the thing to be done must be within the ordinary range of municipal action."

It was held in *Olmstead* v. *Proprietors,* 47 N. J. Law, 311, and *Scudder* v. *Trenton Falls Co.,* 1 N. J. Equity, 694, that a city in supplying its citizens with gas and water did not lose its distinctive municipal character.

It is, therefore, clear from the above authorities that the rate chargeable for gas to the inhabitants of a city is a matter of great municipal concern, *a "municipal purpose,"* and that the City of New York is a necessary and proper party to any suit brought to invalidate an act such as Chapter 125 of the Laws of 1906, fixing the rate of gas at 80 cents per thousand cubic feet for its inhabitants.

The rate of gas would be equally a municipal interest.

All of those public matters, which concern the people of the State at large, in common with the people of a particular locality, such as the administration of justice and the authority of the State generally, through and by legislative enactments adminsitered by State officers, or by virtue of the power of the Central Government, in the preservation of the public peace and affairs of like general character, although some of which may be in the hands of local or municipal authorities, are matters of State or central jurisdiction. On the other hand, all of those public affairs, which concern the inhabitants of the locality, as an organized community, apart from the

people of the State at large, as supplying purely local needs, conveniences and comforts, like water, light, or gas, the establishment of sewers, fire protection, the enforcement of by-laws or ordinances touching the interests of the local corporation alone, are essential matters of local concern.

McQuillan Mun. Corporations, Vol. 1, Sec. 173.

The fundamental idea of a municipal corporation is based on the fact that it is an artificial personality or a governmental organ created to regulate and administer the internal or local concerns of the district embraced within its corporate limits in matters peculiar to such place and not common to the State at large. It is manifest, therefore, that it is not, from the standpoint of State interest, but from that of local interest, that the necessity of the creation and continued existence of cities, towns and villages most distinctly appears.

See

Herbert v. *Benson*, 2 La. Ann., 770;
Police Jury of Bossier v. *Shreveport*, 5 La. Ann., 661.

Such a corporation acts for all the inhabitants residing within its boundaries, in supplying municipal needs, conveniences and comforts through officers in most instances chosen by the qualified electors, either directly by an election or indirectly by appointment of the local au thorities, and who act not by themselves but as trustees, administering the trust committed to their charge for the benefit of the corporation as a whole.

McQuillan Mun. Corps., Vol. 1, Sec. 87.

And the inhabitants residing within the corporate limits, or those entitled to vote at municipal elections, are the members of the corporation. Residence within the pace or district and qualifications as a municipal elector, constitute membership in the corporation, and it is not affected by the wishes of the person or the corporation.

> "In all quasi corporations, as cities, towns, parishes and school districts, membership is constituted by living within certain limits."
>
> *Overseers of the Poor* v. *Sears*, 22 Pick. (Mass.), 122, 130;

approved by GREY, *C. J.*, in

> *Hill* v. *City of Boston*, 122 Mass., 344, 356; 23 Amer. Rep., 332.

It has also been well said that

> "When a man removes into a town, he becomes a citizen thereof, whatever may be the desire of himself or the town. His removal into the town is voluntary. But having removed, it is not optional with himself or the town, whether he shall become a citizen thereof or not."
>
> *Oakes* v. *Hill*, 10 Pick. (Mass.), 333, 346.

And there is no doubt that a judgment against the municipality binds its citizens and taxpayers.

> *Ashton* v. *City of Rochester*, 133 N. Y., 187.

Appreciating, as we do, the close and intimate relationship between the citizens of a municipality and the municipality itself, so far as representing them in matters of this kind is concerned, let us examine the claims advanced by the complainant that the Attorney General and the District Attorney and the Public Service Com-

mission are more directly interested in the result of this litigation than either The City of New York or its citizens.

(2) The status of the Attorney General.

According to the complainant, the only reason why the Attorney General was made a party was because, by reason of the existence of Section 68 of the Executive Law, he is required to defend the constitutionality of the statute in question. But, is that true of this particular statute? So far as we are aware, this particular question has never arisen. Undoubtedly it is the duty of the Attorney General to defend all those statutes of the State in which all the people of the State are interested. But, is he obliged to justify a purely local statute, a special law which is applicable only to a particular city? We think not. Let us assume that one of the provisions of our City Charter were assailed, would any one seriously contend that any obligation rested upon the Attorney General to intervene and defend it? Again, we say no.

If the 80-cent gas law requires the shield and protection of the Attorney General, so did the 75-cent statute which was involved in the prior litigation. And why was it that the complainant then called upon the City to advocate its legality? The Supreme Court, in that case, sanctioned the practice which we are now seeking to compel the Company to follow. It established that procedure and should be forced to live up to it.

But let us assume that it is the Attorney General's statutory duty to defend this enactment, what is the nature of his obligation? Simply to endeavor to sustain the constitutionality of this legislation from a *purely legal point of view. He is not interested in its economic aspects;* he has no concern with the viewpoints of the

consumers. *He would be justified in maintaining that, if the proofs of the complaint justified its contention, his duty ended and that no obligation rested upon him to controvert them.* But there is something more than a mere legal point of view in a suit of this character. The consumer, who pays his money for the gas, and the Company which supplies it, and the *City whose streets are used* and who likewise uses the gas, *are the persons who are directly and financially interested* in a litigation of this character. The Attorney General can lose nothing. Nor can the State suffer any loss. *But an adverse decision will mean a loss of millions to the City and the consumers.* Why should they not have a direct representative instead of being compelled to appear by a state official who has little more than a perfunctory duty to perform, and whose task may be limited to filing a brief, on the law point involved, as *amicus curiae* and not as the attorney for the thousands of consumers who are the complainant's customers.

(3) The status of the Public Service Commission.

The Public Service Commission is a peculiarly constituted body. Strictly speaking, the law does not constitute it the defender of the constitutionality of this statute. Its functions are not only of a legislative but also of a quasi-judicial character and its viewpoint is constantly found to be different from that of the municipality and the consumers. To illustrate: In the *Municipal Gas Company* case (224 N. Y., 156), decided July 12, 1918, which involved the question of the power of the Public Service Commission to raise a rate above the statutory limit, the Public Service Commission contended that it had the power to regulate the price of gas to fix the maximum, in a case where the statute, fixing the maximum, was confiscatory and unconstitutional. That

body has constantly taken this position. And we find this Commission in June, 1919, asserting in the Appellate Division, Second Department, in the *Brooklyn Borough Gas Company* case, that the statute prescribing a $1 maximum rate for the Brooklyn Borough Company was no longer in existence; whereas the contention of The City of New York, representing the consumers, was that that statute was still in force.

Again, the Public Service Commission, sitting in a quasi-judicial or legislative capacity, with respect to hearing complaints, investigating charges and regulating rates, *has frequently fixed rates, which it is apparently unwilling or unable to change.* Such decisions are incorporated in carefully annotated reports. They are frequently cited as adjudications of that body and, in actual practice, *that body feels more or less bound by the decisions which it renders. Thus, when matters of appraisals or valuations come up, the Commission feels that it is limited and restricted by the findings made by the same body at some earlier period.* For this reason, the Commission and its staff are constantly placed in the position of defending its previous rulings and findings and these findings and rulings are frequently controverted by the consumers. It is clear, therefore, under the law which created it and under the rulings which it has made from time to time, that that body cannot be expected to be, in the first instance, the protector of the rights of the consumer. The very nature of its duties bar it from becoming the advocate of a consumer as against a gas company.

(4) As to the interest of The City of New York personally.

It is true that, in the former suit, the validity of Chapter 736 of the Laws of 1905, as well as 125 of the Laws of 1906, were both involved.

Chapter 736 of the Laws of 1905 fixed the rate for gas supplied to The City of New York at 75 cents per 1,000 cubic feet. In the litigation referred to in paragraph VI of the bill of complaint herein and entitled "*Wilcox* v. *Consolidated Gas Co. of New York, et al.*," the validity of this act was sustained by the Supreme Court of the United States. (See 212 U. S., 19, 54.) The United States Supreme Court in that case said:

> "Lastly, it is objected that there is an illegal discrimination as between the City and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the City nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether by the reduced price to the City the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.
>
> We cannot see from the whole evidence that the *price fixed for gas supplied to the City by the wholesale*, so to speak, *would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant.* So long as the total is enough to furnish such return it is not important that with relation to some customers that price is not enough."

In the said litigation entitled "*Wilcox* v. *Consolidated Gas Company of New York, et al.*," the complain-

ant herein made a special attack on said Chapter 736 of the Laws of 1905 on the ground that the same was unduly preferential and discriminatory against the general consumers of gas in The City of New York.

And it is likewise true that, in that litigation, The City of New York, through its Corporation Counsel, made an attack upon the franchises of some of the consolidated companies which formed the present complainant and he claimed that the complainant had no right to lay mains and pipes in some of the streets o ..is City. That question was not decided. It is still open and may be decided in the present suit. It is of great importance because, if the complainant has no right to use our streets, and it is, for that reason a trespasser, it is surely in no position to urge, in an equity suit, that the rates which the Legislature has fixed are confiscatory. We are unable tc perceive that either the Attorney General or the Public Service Commission are particularly interested in the solution of this problem. It is one of purely municipal concern.

There is another phase of this question which must not be overlooked. The mere fact that the complainant asserts that it will not, in this suit, question the 75-cent rate, eliminate the interest of the City. One of the issues necessarily involved in this litigation is the cost of producing and distributing gas. If the 80-cent rate be confiscatory, it may be that it is so because the Company is obliged to supply gas to the City for 75 cents. The elements which constitute the two rates are so closely interwoven that it is impossible to separate them and to say which apply to the 75, and which to the 80-cent rate. The result of this trial will be the making of findings of fact as to the cost of manufacturing and distributing gas. If it be determined that the 80-cent rate, charged to consumers generally, is insufficient and that it

denies to the Company a fair return upon its investment, such a finding will undoubtedly influence not only legislation, but it will also jeopardize the interests of the City in any litigation which may be brought to challenge the constitutionality of the 75-cent rate. Whatever may be said to the contrary, it cannot fail to have that effect. Is it not better, therefore, for all concerned, that the City should be allowed to intervent in this suit so that all of the questions involved may be finally and conclusively settled?

Foster, Federal Practice (5th ed.), Vol. 1, Secs. 110, 116, 120, 128.

The City of New York, therefore, is a necessary and proper party to this litigation in order to protect itself against the claim of this company with regard to its franchise, and further to protect the special 75-cent rate granted it by Chapter 736 of the Laws of 1905. It, therefore, appears that The City of New York is a necessary and proper party defendant to the above-entitled suit and that it must, in order to protect said 75-cent rate, introduce evidence to show the special conditions under which gas is supplied to The City of New York and *prove that the complainant herein, the Consolidated Gas Company of New York, is not required to furnish gas to The City of New York without substantial remuneration and that the service of the complainant to the said City is no ground or basis for holding or contending that the existing rate to consumers is unconstitutional and confiscatory.*

II.

Under Equity Rule 37, The City of New York is a person who "claims an interest adverse to the plaintiff." Its presence "is necessary or proper to "a complete determination of the cause." And, claiming, as it does, "an interest in the litigation," it should "be permitted to assert his (its) rights by intervention."

Equity Rule XXXVII of the Supreme Court of the United States provides, in part, as follows:

> "* * * All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. *Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.* Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.
>
> *Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention,* but the intervention shall be in subordination to, and in recognition of, the propriety of the same proceeding."

The City of New York, your petitioner herein, respectfully submits that a complete determination of the controversy arising out of the above-entitled litigation cannot be had without its presence as a party defendant and that it has an interest in the subject of said action which entitles it to an order permitting it to intervene in said litigation as a party defendant therein. The

City of New York is the largest consumer of the gas furnished by the plaintiff Company.

The City of New York, your petitioner, has no other means of protecting itself against any attack that may be made on the said 75-cent gas rate in said litigation than by and through intervention therein and that it could never obtain relief from a determination against the validity of said 75-cent statutory rate in said litigation unless it were permitted to intervene and protect itself therein.

(1) We are unaware of any cognate rule or statute which is as broad and comprehensive in its scope and meaning as Equity Rule 37. The City claims an interest adverse to the plaintiff. Complainant's interest in the legislation is to have these statutory gas rates declared confiscatory so that it may be able to increase them. The City and the consumer oppose that view. They assert that the rates are not confiscatory and that, if the rates be increased, they will suffer financial losses. Neither the Attorney General or the District Attorney or the Public Service Commission, as such, has any financial interest. What, then, is an "interest" within the meaning of the rule? Interests, generally speaking, are of two classes, legal and equitable, and these may be sub-divided into what have been termed pecuniary, proprietary and personal interests. We fail to appreciate, within the meaning of any of these expressions, that any of the defendants has any "interests" in this controversy. On the other hand, it was held by this Court, in

> *Delaware, Lackawanna & Western R. R. Co.* v. *Interstate Commerce Commission,* Circuit Court of Appeals, Second Circuit, 169 Fed. Rep., 894,

that individual shippers, who were pecuniarily interested in the rates which had been fixed by the Commission,

were entitled to protect those interests, by intervening in an equity suit, brought by a common carrier, to have the rates annulled. That is precisely the present situation. The consumers or their duly authorized representative, their statutory attorney in fact, The City of New York, for the reasons which we have enumerated, are vitally interested in having the present gas rates sustained. Who else is, who else can be, interested? So far as we can discern, there is no conflict between these views and those expressed by the Court.

In re Engelhard, 231 U. S., 646.

Engelhard invoked the original jurisdiction of the Supreme Court by applying for a writ of mandamus to compel a Judge of the District Court to vacate an order made by him, in a suit brought by the Cumberland Telephone and Telegraph Company against the City of Louisville, in so far as the order denied to Engelhard the right to sue on behalf of all subscribers of the Telephone and Telegraph Company, similarly situated with him, who had paid the Telephone and Telegraph Company, during the pendency of the injunction against a certain rate ordinance enacted by the City, sums in excess of the rates fixed in the ordinance. Engelhard, as such petitioner, further asked the Supreme Court to compel the District Court Judge, by mandamus, to enter an order permitting him to sue for and represent and act on behalf of such subscribers with respect to the restitution of the sums so collected. As the opinion of the Court, delivered by Mr. Justice McKenna, clearly shows, all that the Court held was that the District Court did not exceed its discretion in making the order under review (see 231 U. S., at page 651); and that the District Judge could not be compelled, by mandamus, to reverse himself (see p. 652).

The nature of the intervention, sought in the *Engelhard* case, was thus entirely different, both in respect to the individual capacity in which an intervention was sought and also in respect to the nature of the issues which the petitioner sought to litigate. Moreover, the application to intervene was made by Engelhard after the suit had been in progress for more than a year and a half. The present application to intervene was made at the very inception of the suit. It was made by the municipality which had actively participated in the former suit which was fought out ten years ago. In that prior litigation, The City of New York took the leading part in resisting, by proofs, the allegations of the complainant and in seeking to sustain, and succeeding in sustaining, the validity of this same statute against the claim then made that it was confiscatory. The constitutionality of that statute being again challenged on supplemental facts by this complainant, the City asks permission of this Court to intervene, not for the purpose of interjecting any foreign or subsidiary issues in the case, but simply and solely for the purpose of defending the statute against the alleged claim of the complainant that it is now confiscatory in its operation upon it.

Since complainant lays so much stress on *In re Engelhard*, Mr. Justice McKenna's opinion may be read with profit. Unless we are very much mistaken, this Court will find in it language and dicta which are very helpful and which lend support to the present application.

In

Northern Pac. Ry. Co. v. *Lee* (District Court, W. D. Washington, S. D.), 199 Fed., 621,

the Court held that in a suit by a railroad company against a state commission to enjoin the enforcement of freight rates established by it under a state statute, ship-

pers of articles affected by such rates may properly be joined as defendants as representatives of their class on an allegation that, unless enjoined, they will attempt to enforce such rates. Referring to the subject (at page 627), it was said:

> "Under the demurrers, the first ground urged is that there is a misjoinder of parties defendant, in that certain shippers are joined with the members of the state Commission and the state's Attorney General as defendants—it being alleged that they will, unless enjoined, seek to enforce the rates fixed by the Commission. They are sued as representatives of that class of shippers, shipping the commodities affected by the modified rates. Therefore they are proper, if not necessary, parties. Though not directly ruled upon, this course has been noticed with apparent approval by the Supreme Court in *Ex parte Young*, 209 U. S., 123, 28 Sup. Ct., 441, 52 L. Ed., 714, 13 L. R. A. (N. S.), 932, 14 Ann. Cas., 764. While it is true that, through the Commission and the state's Attorney General, the public is represented, though the state is not sued, yet the shippers joined as defendants are representatives of a class directly and particularly affected."

So long as the 80-cent Gas Law remains in force, there is lodged in The City of New York the power and right to compel obedience to its provisions, by any company violating the same, by a mandamus proceeding.

In

> *State ex rel. City of Bridgeton* v. *Bridgeton & M. Traction Co.*, 62 N. J. L., 592, 45 L. R. A., 837, 841,

LIPPINCOTT, *J.*, stated:

> "* * * that the city of Bridgeton, representing the public, *for whose benefit the ordinance was passed*, and the road constructed and oper-

ated, is a proper party as relator. This position seems to be clearly sustained by all the authorities. * * *"

See, also,

People ex rel. Lehmaier v. *Interurban Street Railway Co.*, 177 N. Y., 296, at p. 301;
Matter of International Ry. Co. v. *Rann*, 224 N. Y., 83;
Muncie Natural Gas Co. v. *Muncie*, 160 Ind., 109, 60 L. R. A., 829;
Charter of The City of New York, Sec. 255.

That section provides, in part, that

"The corporation counsel shall have charge and conduct of all the law business of the corporation and its departments and boards *and of all law business in which the city of New York is interested*, except as otherwise herein provided. * * * The corporation counsel, except as otherwise herein provided, shall have the right * * * to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or any part or portion thereof, *or of the people thereof*. * * *"

This is a very positive, clear and unmistakable declaration, by the Legislature, that any local laws, which are specially applicable to The City of New York, shall be enforced and sustained, not by the Attorney General or the Public Service Commission, but by The City of New York. But we go further and assert, in all confidence, if there be any conflict between Section 68 of the Executive Law, upon which the complainant relies, and the section of the Charter which we have quoted, that the general state law must yield to the special local law.

Schieffelin v. *McClellan*, 135 App. Div., 665, 669; affd. 197 N. Y., 610.

The authorities, interpreting the meaning of the word "necessary" or "proper" parties, are in such hopeless confusion that it is impossible to even attempt to reconcile them. The question as to who may or may not be necessary or proper parties is and always has been, in very many cases, a most difficult and perplexing one. It constitutes of itself a title in the law of equity jurisprudence upon which great learning has been expended, without the ascertainment of any rule of general or universal application. Each case must still be determined, to a considerable extent, upon its own peculiar facts and circumstances, the objects of all rules upon the subject being in accordance with the cherished principles in equity that the adjudication may be as complete and conclusive as possible. The rule to be gathered from all the authorities may in a few words be stated to be that in no case does the jurisdiction of the courts over the subject matter and parties properly before it depend, nor can it be made to depend, on the absence of other parties, however the right of other parties may be complicated by the decree, or however necessary it may be that they should be brought in, in order that a complete and final determination of the controversy may be had.

Board of Supervisors of Iowa County v. *Mineral Point R. Co.*, 24 Misc., 93, 132.

Can a complete and final determination of this controversy be had without the presence of the City? If the City be not made a party, any adjudication which may be made will not bind it and, if it be adverse to its interests of the interests of its people, it will be obliged to relitigate any determination which may be made. Giving the phrase, "a complete and final determination of the controversy," its broadest construction, it may be held to mean the entry of any judgment. That is a "final"

determination of that controversy so far as the persons who are before the court in that litigation are concerned; but that, we submit, is not the meaning of Equity Rule 31.

> "Persons whose interests will necessarily be affected by any decree that can be rendered, are necessary and indispensable parties" (15 Enc. Pl. and Prac., p. 612).
>
> "Necessary and indispensable parties include 'all persons who have an interest in the controversy of such a nature that the final decree cannot be made without either affecting their interests or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience' (*id.*, pp. 611, 612).
>
> "The term 'necessary parties' also includes persons who * * * are so connected with the subject matter of the controversy that it is necessary to have them before the court for the proper protection of those whom the decree will necessarily and directly affect" (*id.*, p. 614).
>
> *Chandler* v. *Ward,* 188 Ill., 322, 58 N. E., 919, 924.

Or, as it has been otherwise stated,

> "proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation."
>
> *Tatum* v. *Roberts,* 59 Minn., 52, 60 N. W., 848, 849.

Numerous other cases expound similar views.

> "In actions in equity, so-called necessary parties are those without whom no decree can be

> effectively made. 'Proper' parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all persons who have any interest in the subject matter of the litigation. Pom. Rem. & Rem. Rights, Section 329."
>
> *Lumbermen's Ins. Co.* v. *City of St. Paul,* 77 Minn., 410, 80 N. W., 357, 358.

A broad and most important distinction must, therefore, be made between the two classes of parties defendant, namely, those who are "necessary" and those who are "proper."

> "Necessary parties, when the term is accurately used, are those without whom no decree can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all persons who may have any interest in the subject matter of the litigation."
>
> *Rosina* v. *Trowbridge,* 20 Nev., 105, 17 Pac., 751, 755.

The rulings of the Federal Courts are in accord with these views. Thus, in

> *Sioux City Terminal Railroad & W. Co.* v. *Trust Co. of N. America* (Circuit Court of Appeals, Eighth Circuit), 82 Fed., 124, 126.

Circuit Judge SANBORN, after defining what constitutes an "indispensable" party, stated that

> "every other party who has an interest in the controversy or the subject matter which is separable from the interest of the parties before the Court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party."

A "proper party," it was held in

> *Kelly* v. *Boettcher* (Circuit Court of Appeals, Eighth Circuit), 85 Fed., 55, 64.

> "as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an interest in the subject matter of the litigation, which may be conveniently settled therein."

See, also,

> *Donovan* v. *Campion* (Circuit Court of Appeals, Eighth Circuit), 85 Fed., 71, 72.

(3) As has been stated, the proposed intervention of the City is "in subordination to, and in recognition of the propriety of the main proceeding."

We recognize the propriety of a suit of this character. If these rates are confiscatory, undoubtedly a suit of this character is maintainable. We find no fault on that score. To repeat, our position is that it is impossible from either an equitable or legal point of view, to have a full, fair and complete adjudication of the issues involved without the presence of the City.

III.

The Circuit Court for the Northern District of California has clearly pointed out the inapplicability of the cases which the respondent company cited before the Court of Appeals to sustain the proposition that the municipality, in a suit like the present, does not represent the consumers,

> *San Francisco G. & El. Co.* v. *City and County of San Francisco* (Circuit Court, N. D. California), 164 Fed., 884, 887.

In the case cited, it was squarely held that a municipality sufficiently represents the gas consumers, who reside within its borders, as to justify, in a suit in which the former is made a party defendant, an injunction against the latter, although they are not formally joined. Referring to the rule that

> "where the parties concerned are so numerous as to make it practically impossible to bring them all before the court, but, the right being common to all, one or more being made parties are permitted to represent all, or where those who are impleaded stand, under the law, in a representative or trust relation to those who are not" (p. 886),

the Court (at p. 887), said:

> "This rule is peculiarly applicable to cases like the present. Here the real parties in interest are the ratepayers or consumers—the public. The ordinance fixing the rate is for the benefit of the latter, not for that of the supervisors or municipality alone. The supervisors are acting in a purely representative capacity. They stand for and represent, not only the municipality, but the entire community or body of consumers, and in this re-

spect they must be regarded as occupying the relation of trustees to the latter. As stated by Mr. Freeman in Section 178 of his work on Judgments:

> 'The position of a county or municipal corporation towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his *cestuis que* trust, when they are numerous and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit.'

"Here the purpose of the action is not only to have the obnoxious regulation declared void as violative of complainant's constitutional rights, but to have the enforcement of that rate restrained pending the determination of its validity, that complainant may not suffer irreparable wrong in the meantime through the bringing by individual consumers of a multiplicity of actions to enforce it. It being practically impossible, indeed prohibitive, in such a case to make each individual ratepayer a party, the law is satisfied by joining with the rate-making body the board of supervisors, the city and county, which latter is not only itself a consumer, but stands as a representative of the entire body of consumers within the municipality. This principle was involved in the case of *San Diego Land Co.* v. *Jasper* (C. C.), 110 Fed., 702, 712, decided by Judge Ross. In that case the board of supervisors was made defendant, and with it were joined the petitioners upon whose petition, as required by the statute, the board had acted in making the regulation. These petitioners made default and thereupon the complainant contended that the latter were the real parties in interest and that it was entitled *ipso facto* upon their default to a decree against all the defendants. But this relief was denied, the Court saying:

'The answer to the first point is that each and every person to whom the rates fixed apply —in other words, the public—is interested in the question, and the representative of this public in the matter is the board of supervisors, each member of which was by the complainant made a party defendant to the suit, and all of whom appeared to the bill and interposed a defense in behalf of all parties interested. This practice has been uniformly sanctioned and held to be proper.' * * *

"This case went to the Supreme Court (*San Diego Land & Town Company* v. *Jasper,* 189 U. S., 439, 23 Sup. Ct., 571, 47 L. Ed., 892), and that Court, in affirming the decree of the Circuit Court, said: * * *

"Again, in *Railway Company* v. *Minnesota,* 134 U. S., 418, 10 Sup. Ct., 462, 702, 33 L. Ed., 970, Mr. Justice MILLER, in his concurring opinion, discussing a similar question, said: * * *

"See, also, *St. Louis & S. F. R. Co.* v. *Dill,* 156 U. S., 649, 15 Sup. Ct., 484, 39 L. Ed., 567; *Reagan* v. *Trust Co.,* 154 U. S., 362, 14 Sup. Ct., 1047, 38 L. Ed., 1014; *Smyth* v. *Ames,* 169 U. S., 466, 18 Sup. Ct., 418, 42 L. Ed., 819; *San Diego Land & Town Co.* v. *National City,* 174 U. S., 739, 19 Sup. Ct., 84, 43 L. Ed., 1154; *Spring Valley Water Works* v. *San Francisco,* 82 Cal., 286, 22 Pac., 910, 1046, 6 L. R. A., 756, 16 Am. St. Rep., 116. These cases proceed upon the theory that the rights to be protected under the regulating ordinance, and which complainant has assailed, are public rights, and that the only practical way of making the public a party is by suing its representatives; that when this is done the individuals composing the public are, equally with the parties named in the bill, bound by every step properly taken in the action, and may, therefore, be included in and restrained by the injunctive orders of the Court.

"It was upon this principle that Judge MORROW, by his injunction granted in *Spring Valley Water Works* v. *San Francisco* (C. C.), 124 Fed.,

574, an action to declare void an ordinance fixing water rates in the City and County of San Francisco, included the entire body of consumers, restraining the latter, equally with the defendants of record, from in anywise seeking to enfroce the ordinance pending suit. Touching that question, Judge MORROW says:

> 'In this discussion I have not considered the controversy concerning hydrant rates for water supplied to the City, alleged by the complainant to be unreasonably low, nor have I considered the water rates for public buildings paid for by the City. The questions discussed have had relation only to the rights of private consumers, and in this connection the Court at the close of the oral argument suggested a query as to the effect of an injunction upon private consumers directed to the defendants, the Board of Supervisors, or the officers of the municipal corporation. An examination of the authorities submitted by the counsel for the complainant with this question in view has satisfied me that there will be no difficulty in this aspect of the case. The Board of Supervisors, or the municipal corporation, or perhaps both, represent the water rate payers in this controversy, and are bound by the proceedings. This has been established by abundant authority.'

"A like course was followed by Judge MORROW in the more recent case of *San Joaquin, etc., Canal Company* v. *Stanislaus County* (No. 14,554, decided June 29, 1908), 163 Fed., 567, and by Judg GILBERT in *Contra Costa Water Company* v. *City of Oakland* (No. 13,599), 165 Fed., 518, both in this court. And in *Spring Valley Water Company* v. *San Francisco* (No. 14,735, just decided by Judge FARRINGTON), 165 Fed., 667, on motion for an injunction *pendente lite*, the same practice is followed and the consumers are expressly enjoined. These cases would seem to be conclusive of the

question so far as this court is concerned. As against them defendants rely upon *Consolidated Gas Company* v. *Mayer*, above referred to; *Richman* v. *Consolidated Gas Co.*, 114 App. Div., 216, 100 N. Y. Supp., 81; and *Buffalo Gas Co.* v. *City of Buffalo* (C. C.), 156 Fed., 370. The first case was an action to have declared void a rate for illuminating gas in the City of New York. This rate had been fixed, not only by the gas commission—a rate-fixing body established by the Legislature, but the same rate had been established directly by act of the Legislature. The court, as here, had issued a temporary restraining order as a condition for a continuance asked by defendants, prohibiting the officers specially charged with enforcing the rate from taking any step to that end pending litigation; and the motion was for an enlargement of the terms of the restraining order to extend its effect to the consumers. This feature of the motion was denied; the court, while using some general language favorable to defendant's views, very evidently placing its ruling upon the ground that the Legislature having itself fixed the rate sought to be avoided, and there being in such an instance no mode of ascertaining the basis upon which the Legislature had acted, the presumption of the validity of the rate so fixed must obtain until the court could determine, upon final proof and hearing, that it was void, and that in the meantime its enforcement by consumers should not be enjoined. * * *

"A careful review of the whole case makes it clear that it was by reason of the particular circumstances arising from the effect of the acts of the Legislature that Judge LACOMBE was led to hold that the case was outside the rule above indicated as applicable to the ordinary case where, as here, the rate is fixed by a board or commission after a hearing.

"This was very clearly the view taken by the Supreme Court of New York in the second case above cited by defendants, where, passing upon

the same rate, it was expressly held that, the regulation having been fixed by statute, its constitutionality must be presumed until a final judicial determination to the contrary; that until such determination can be had the consumers are entitled to service based thereon; and, further, that the rate fixed by the gas commission must be held as superseded by the act of the Legislature, and in such case the commission cannot be regarded as representing the consumers in a suit involving the validity of such legislative act.

* * * * * * *

"The third case relied upon by defendants—decided by Judge HAZEL, in the Circuit Court for the Western District of New York—is very evidently cited under a misapprehension as to the effect of the ruling there made. The case does not, as supposed by counsel, follow *Consolidated Gas Company* v. *Mayer,* but the learned Judge proceeds to distinguish it, and, in strict accord with the principles of *San Diego, etc.* v. *Jasper,* and the other cases in line therewith, grants the injunction asked. He there says (156 Fed., 371):

> 'Counsel for defendant further contends that neither the City nor the inhabitants can be restrained in this suit under the doctrine announced by Judge LACOMBE in *Consolidated Gas Company* v. *The Mayor, et al.* (C. C.), 146 Fed., 150, and later approved by Judge LAUGHLIN in *Richman* v. *Consolidated Gas Company,* 114 App. Div., 216, 100 N. Y. Supp., 81. In the former case the Court dealt with the provisions of a special act of the Legislature applicable to New York City fixing the price of gas sold to the City at 75 cents per 1,000 cubic feet. For failing to comply with its provisions a penalty is prescribed in the act which the Attorney General or the District Attorney is empowered to collect under section 1962 of the Code of Civil Procedure. For reasons stated in the opinion, the Court, in the *Mayer* case,

declined to enjoin The City of New York. Such reasons, however, are not wholly applicable to this controversy, for here admittedly the City of Buffalo and its Mayor threatens to compel the enforcement of Laws of 1905, page 2100, chapter 739, which provides under section 20 that the Commission, or any person, corporation, or municipality, interested in the enforcement of such order, may apply to the Supreme Court for a writ of mandamus to compel compliance with such order. This Court is therefore persuaded that The City of New York was not enjoined by Judge LACOMBE because in that case the Attorney General and the District Attorney, who were parties, were charged with the responsibility of recovering the specified penalty for non-compliance with the statute, and also because the price of gas to The City of New York was fixed by the Legislature at a less sum than that charged consumers; while in this case the City of Buffalo, in the absence of a contract providing for a less price, probably is liable for an amount equal to that charged the individual consumer. In any event, the action of the Commission declares what shall be the maximum price to consumers of gas, and concededly the City is one of complainant's customers.' "

IV.

The power and responsibility of representing the people of the City of New York who are consumers of the Consolidated Gas Company of New York, in this action, has been imposed on the Corporation Counsel by Section 255 of The Greater New York Charter as amended.

The Greater New York Charter as amended reads in part as follows:

> Section 255.
> "* * * The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law, in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or any part or portion thereof *or of the people thereof*, * * *"
> (For a complete copy of this section see page 64).

The respondent herein, the Consolidated Gas Company of New York, uses the streets of the City of New York and enjoys the protection of its fire, police, water and other departments and the City of New York levies taxes upon the said respondent corporation herein under provisions of law, and from many points of view of municipal administration is interested in the respondent herein and its operation. The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration to the people of the City of New York who are consumers of the respondent, the Consolidated Gas Company of New York, and affects their health, happiness, comfort and convenience.

V.

The power and responsibility of The City of New York of representing the inhabitants of such city who are consumers of the respondent Consolidated Gas Company of New York herein, is also imposed on the Corporation Counsel of The City of New York by Chapter 247 of the Laws of 1913, which amended the General City Law and is known as the Home Rule Bill.

Chapter 247 of the Laws of 1913 grants to the City

> "the power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power or to execute other powers comprehended within this general grant."

Among the specific powers granted to the City by this act are the following:

> "to maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

The term "general welfare" as used in the law just quoted, is defined in Section 21 of said law as follows:

> "§21. *Public or municipal purpose and general welfare defined.* The terms 'public or municipal purpose' and 'general welfare' as used in this article, shall each include the promotion of educa-

tion, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

What affects more the health, safety and comfort of the people of the City than a proper and safe supply of gas, and what promotes more their conveniences and home comforts than such a supply? Under the express provisions of said Chapter 247 of the Laws of 1913, the City must preserve and care for the comfort and general welfare of the people of the City who are consumers of the respondent, the Consolidated Gas Company of New York, and, therefore, must protect and defend them against this attack upon this legislative gas rate fixed by a special city act in their favor at 80 cents per 1,000 cubic feet of gas sold.

VI.

The City of New York is a necessary and proper party to this litigation for the reason that the 75-cent rate for gas fixed for it by Chapter 736 of the Laws of 1905 is necessarily involved therein.

The verified promise of the vice-president of the respondent, the Consolidated Gas Company of New York, that it would not attack the 75-cent rate provided for the City is not conclusive or binding and amounts to nothing more than the personal promise of the affiant. One of the issues necessarily involved in this litigation is the cost of producing and distributing gas. The confiscatory character of this rate may depend upon the 75-cent rate allowed the City of New York. The factors which go to make up the 80-cent rate and the 75-cent rate are so closely related and connected that it is impos-

sible to separate them in this rate litigation and to say which elements going to constitute the rate apply to the 80-cent rate and which apply to the 75-cent rate.

As a result of this litigation the Special Master and the Court will have to make and approve findings of fact as to the cost of manufacturing and distributing gas. Should it be determined that the 80-cent rate charged to consumers generally is confiscatory and that it denies to the Consolidated Gas Company a fair return upon its investment, such a finding will undoubtedly influence not only legislation, but it will also endanger the interests of the City in any litigation which may be brought to test the constitutionality of the 75-cent rate.

Therefore, in order to protect the 75-cent rate in this litigation, the City of New York should be allowed to intervene as a necessary and proper party defendant.

VII.

The order of the District Court denying, as a matter of law, and not in the exercise of discretion, the motion for the City for intervention, is a final order.

In the following cases, and in this Circuit, the rule appears to be settled that an order denying a motion for leave to intervene, as a matter of law, is a final order and is appealable.

Gumbel v. *Pitkin*, 113 U. S., 545;
Houghton v. *Burden*, 228 U. S., 161, 165;
Minot v. *Mastin* (Circuit Court of Appeals, Eighth Circuit), 95 Fed., 734, 739;
United States v. *Philips* (Circuit Court of Appeals, Eighth Circuit), 107 Fed., 824;

Central Trust Co. v. *Chicago, R. I. & P. R. Co.* (Circuit Court of Appeals, Second Circuit), 218 Fed., 336;

Harry Bros. Co. v. *Yaryan Naval Stores Co.* (Circuit Court of Appeals, Fifth Circuit), 219 Fed., 884.

In the *Philips* case (*supra*), which was approved in the *Central Trust Company* case, it was said:

> "This court has held that there are two kinds of interventions. To the one class belong those cases in which the court or chancellor, to whom the application is made, is not bound to permit a third party to intervene, and load the case with collateral issues, and in which the allowance of an intervention is entirely discretionary with the chancellor. To the other class of cases belong those in which the right to intervene is absolute, resting, as it does, upon the grounds of necessity, and the inability of the intervenor to obtain such relief as he is entitled to by any other means than an intervention. *Minot* v. *Mastin,* 37 C. C. A., 234, 95 Fed., 734, 739; *Credits Commutation Co.* v. *U. S.*, 34 C. C. A., 12, 91 Fed., 570, 62 U. S. App., 728, 733. When a chancellor denies leave to intervene, in a case belonging to the first class, no appeal lies, because the action of the chancellor is discretionary; and because the chancellor's action, in denying leave to intervene, is not a final adjudication upon the intervenor's rights. *But, when a chancellor denies the right to intervene in a case belonging to the second class, an appeal lies, because the chancellor's action was not discretionary, and beccause such action was a final adjudication, in that it denied him relief which he could obtain only by an intervention in the pending cause.* Now, in view of the fact that there are two species of intervening complaints and that it may be sometimes difficult to determine to which class the intervention belongs, we think that the

correct practice for the chancellor, after refusing to intervene is to grant an appeal as a *matter of course*, if the intervenor prays for an appeal. When the record is removed to the Appellate Court it can then be determined by that tribunal whether the action of the lower court was purely discretionary, and its judgment not final, or whether the intervenor was entitled to assert his rights by an intervention. Such course of procedure on the part of the chancellor would seem to be necessary, because, if a mistake is made by the lower court as to the character of the intervention, and the chancellor refuses an appeal, the intervenor is entirely without a remedy. In view of these considerations, we think that in the present instance the chancellor should have allowed the appeal and that a motion should have been made in the appellate tribunal to dismiss the appeal. * * * We apprehend that there will be no occasion to issue an alternative writ as we have no doubt that the respondent will allow an appeal in the case when advised of the views of this court."

VIII.

There is a constitutional question involved in this application and its refusal, which the Supreme Court has jurisdiction to review.

This constitutional question consists in:

(1) The refusal of the District Court to allow The City of New York to become a party defendant in this litigation.

(2) The refusal of the District Court to allow the Corporation Counsel to appear for the inhabitants of The City of New York who are consumers of the respondent company, the Consolidated Gas Company of New York.

The Constitution of the United States provides that no man shall be deprived of his property without due process of law. The right of the municipality to appear in this litigation through the Corporation Counsel, and the right of the consumers of the respondent company to appear therein through the Corporation Counsel of The City of New York is a property right, and if this right be denied, such denial is a constitutional question reviewable by the Supreme Court of the United States.

CONCLUSION.

The order appealed from should be reversed and the motion to intervene should be granted.

Dated, New York, September 29, 1919.

Respectfully submitted,

WILLIAM P. BURR,
Corporation Counsel,
Solicitor for Appellant.

JOHN P. O'BRIEN,
VINCENT VICTORY,
of Counsel.

APPENDIX.

Chapter 125 of the Laws of 1906:

"AN ACT in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Became a law, April 3, 1906, with the approval of the Governor. Passed, three-fifths being present.

Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

"1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, *eighty cents.*

"2. In the second and fourth wards of the borough of Queens, and in the thirtieth ward of the borough of Brooklyn, one dollar.

"3. In the third ward of the borough of Queens, in the thirty-first ward of the borough

of Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

"4. In that portion of the borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

"§2. The illuminating gas furnished by any such corporation, association, co-partnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

§3. Any corporation, association, co-partnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

"§4. This act shall not apply to gas furnished or sold to the City of New York.

"§5. Chapter three hundred and eighty-five of the laws of eighteen hundred and ninety-seven, entitled 'An Act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants,' and all other acts or parts of acts inconsistent herewith are hereby repealed.

"§6. This act shall take effect on the first day of May, nineteen hundred and six."

(Italics are ours.)

Chapter 736 of the Laws of 1905:

"AN ACT in relation to the price of illuminating gas furnished or sold to the City of New York and providing a penalty for violation.

Accepted by the City.

Became a law, June 3, 1905, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. A corporation, association, co-partnership or person engaged in the business of furnishing or selling illuminating gas in the City of New York, shall not charge said city or receive therefrom for such gas, a sum in excess of seventy-five cents per one thousand cubic feet.

§2. The illuminating gas furnished or sold by any such corporation, association, co-partnership or person to said city shall have an illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming

five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of said illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches.

§3. Any corporation, association, co-partnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to be sued for and recovered in the name of and by the City of New York for its benefit.

§4. All acts or parts of acts inconsistent herewith are hereby repealed.

§5. This act shall take effect on the first day of July, nineteen hundred and five.

Article XII, Section 2, of the Constitution of the State of New York:

"§2. Classification of cities; general and special city laws; special city laws; how passed by legislature and acceptance by cities.

All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of one hundred and seventy-five thousand or more; the second class, all cities having a population of fifty thousand and less than one hundred and seventy-five thousand; the third class, all other cities. *Laws* relating to the *property, affairs* or *government* of cities, and the several departments thereof, are divided into *general* and *special city laws;* general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a

class. *Special city laws shall not be passed except in conformity with the provisions of this section.* After any bill for a special city law, relating to a city, has been passsed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same. *In every city of the first class, the mayor,* and in every other city, the mayor and the legislative body thereof, *concurrently, shall act for such city as to such bill;* but the Legislature may provide for the concurrence of the legislative body in cities of the first class. *The Legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon.* Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. Whenever any such bill is accepted as herein provided, it shall be subject as are other bills, to the action of the Governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the legislature, and it shall then be subject as are other bills, to the action of the Governor. *In every special city law which has been accepted by the city* or cities to which it relates, *the title shall be followed by the words 'accepted by the city,'* or 'cities,' as the case may be; in every such law which is passed without such acceptance, by the words 'passed *without the acceptance of the city,'* or 'cities,' as the case may be." (Italics ours.)

Section 74 of the Public Service Commissions Law, Chapter 48 of the Consolidated Laws of New York, as amended by the Legislatures of 1918 and 1919:

§74. SUMMARY PROCEEDINGS. Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the Supreme Court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the Court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the Court shall immediately inquire into the facts and circumstances in such manner as the Court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the Court necessary or proper to join as parties in order to make its order, judgment or write effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or

both issue as prayed for in the petition or in such modified or other form as the Court may determine will afford appropriate relief.

Chapter 247 of Laws of New York of 1913, as amended by Chapter 483 of Laws of 1917.

"AN ACT to amend the general city law, in relation to the powers of cities.

Became a law April 10, 1913, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-six of the laws of nineteen hundred and nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," is hereby amended by inserting therein after article two a new article, to be two-a thereof, to read as follows:

ARTICLE 2-A.

POWERS OF CITIES.

§19. **General grant of powers.** Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and

proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within this general grant.

§20. **Grant of specific powers.** Subject to the constitution and general laws of this state, every city is empowered:

1. To contract and be contracted with and to institute, maintain and defend any action or proceeding in any court.

2. To take, purchase, hold and lease real and personal property within and without the limits of the city, and acquire by condemnation real and personal property within the limits of the city, for any public or municipal purpose, and to sell and convey the same, but the rights of a city in and to its water front, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section.

3. To take by gift, grant, bequest or devise and to hold and administer real and personal property within and without the limits of the city, absolutely or in trust for any public or municipal purpose, upon such terms and conditions as may be prescribed by the grantor or donor and accepted by the city.

4. To levy and collect taxes on real and personal property for any public or municipal purpose.

5. To become indebted for any public or municipal purpose and to issue therefor the obligations of the city, to determine upon the form and the terms and conditions thereof, and to pledge the faith and credit of the city for payment of principal and interest thereof, or to make the same

payable out of or a charge or lien upon specific property or revenues; to pay or compromise claims equitably payable by the city, though not constituting obligations legally binding on it, but it shall have no power to waive the defense of the statute of limitations or to grant extra compensation to any public officer, servant or contractor.

6. To establish and maintain sinking funds for the liquidation of principal and interest of any indebtedness, and to provide for the refunding of any indebtedness other than certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued or in the taxes for the year next succeeding, and payable out of such taxes.

7. To lay out, establish, construct, maintain, operate, alter and discontinue streets, sewers and drainage systems, water supply systems, and lighting systems, for lighting streets, public buildings and public places, and to lay out, establish, construct, maintain and operate markets, parks, playgrounds and public places, and upon the discontinuance thereof to sell and convey the same.

8. To control and administer the water front and waterawys of the city and to establish, maintain, operate and regulate docks, piers, wharves, warehouses and all adjuncts and facilities for navigation and commerce and for the utilization of the water front and waterways and adjacent property.

9. To establish, construct and maintain, operate, alter and discontinue bridges, tunnels and ferries, and approaches thereto.

10. To grant franchises or rights to use the streets, waters, water front, public ways and public places of the city.

11. To construct and maintain public build-

ings, public works and public improvements, including local improvements, and assess and levy upon the property benefited thereby the cost thereof, in whole or in part.

12. To prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty.

13. To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses.

14. To create, maintain and administer a system or systems for the enumeration, identification and registration, or either, of the inhabitants of the city and visitors thereto, or such classes thereof as may be deemed advisable.

15. To establish, maintain, manage and administer hospitals, sanitaria, dispensaires, public baths, almshouses, workhouses, reformatories, jails and other charitable and correctional institutions; to relieve, instruct and care for children and poor, sick, infirm, defective, insane or inebriate persons; to provide for the burial of indigent persons; to contribute to and supervise charitable, eleemosynary, correctional or reformatory institutions wholly or partly under private control.

16. To establish and maintain such institutions and instrumentalities for the instruction, enlightenment, improvement, entertainment, recreation and welfare of its inhabitants as it may deem appropriate or necessary for the public interest or advantage.

17. To determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of all

employees of the city and the relations of all officers and employees of the city to each other, to the city and to the inhabitants.

18. To create a municipal civil service; to make rules for the classification of the offices and employments in the city's service, for appointments, promotions and examinations, and for the registration and selection of laborers.

19. To regulate the manner of transacting the city's business and affairs and the reporting of and accounting for all transactions of or concerning the city.

20. To provide methods and provide, manage and administer funds for pensions and annuities for and retirement of city officers and employees.

21. To investigate and inquire into all matters of concern to the city or its inhabitants, and to require and enforce by subpœna the attendance of witnesses at such investigations.

22. To regulate by ordinance any matter within the powers of the city, and to provide for the enforcement of ordinances by legal proceedings, to compel compliance therewith, and by penalties, forfeitures and imprisonment to punish violations thereof.

23. To exercise all powers necessary and proper for carrying into execution the powers granted to the city.

24. To regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces, and for said purposes to divide the city into districts. Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as con-

ditions may permit, provision for adequate light, air and convenience of access, and shall be made with reasonable regard to the character of buildings erected in each district, the value of land and the use to which it may be put, to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city.

25. To regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

26. The provisions of subdivisions twenty-four and twenty-five of this act shall not apply to cities of the first class having a population of not less than two hundred and forty thousand and not more than four hundred and fifty thousand.

§21. **Public or municipal purpose and general welfare defined.** The terms "public or municipal purpose," and "general welfare," as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section.

§22. **This grant in addition to existing powers.** The powers granted by this article shall be in

addition to and not in substitution for, all the powers, rights, privileges and functions existing in any city pursuant to any other provision of law.

§23. **Powers hereby granted, how to be exercised.** 1. The powers granted by this act are to be exercised by the officer, officers or official body vested with such powers by any other provision of law or ordinance (subject to amendment or repeal of any such ordinance) and in the manner and subject to the conditions prescribed by law or ordinance (subject to amendment or repeal of any such ordinance), but no provision of any special or local law shall operate to defeat or limit in extent the grant of powers contained in this act; and any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this article, shall be superseded. Where any such provision of special or local law is superseded under the provisions of this subdivision, such power, freed from the limitations imposed by such provision, shall be exercised by the same officer, officers or official body that would be vested with the same under the provisions of this subdivision, if such provision had not been superseded, but the exercise thereof shall be subject to the limitations provided for in subdivision two of this section.

2. In the absence of any provision of law or ordinance determining by whom or in what manner or subject to what conditions any power granted by this act shall be exercised, the common council or board of aldermen or corresponding legislative body of the city shall, subject to the provisions of this section, have power by ordinance to determine by whom and in what manner and subject to what conditions said power shall be exercised. The exercise by any city of any power granted by this article not now vested in such city or now vested in such city subject to provisions

which are superseded by the provisions of subdivision one of this section, shall be subject to the following limitations:

a. No city shall issue any obligations for expenses for maintenance, repairs or current operation or administration of the property or government of the city or otherwise than for betterments, improvements and acquisitions of property of a permanent nature, or for the purpose of refunding obligations of the city. No city shall issue obligations until there shall first have been filed in the office of the city clerk a certificate of the comptroller or other chief financial officer of the city under his hand and seal, stating (1) the then existing indebtedness of the city; (2) how much, if any, thereof consist of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, and how much, if any, of such certificates or revenue bonds has not been paid out of the taxes for the year when such certificates or revenue bonds were issued for the year next succeeding; (3) the amount of the assessed valuation of the real estate of the city subject to taxation, as shown by the assessment rolls of said city on the last previous assessment for state or county taxes; (4) a description of the property or improvement for the acquisition or making of which the debt is to be created; and (5) the probable life of such property or improvement. Such certificate shall be a public record. The term of payment of any obligations issued to secure such debt shall not exceed the probable life of such property or improvement as stated in such certificate and shall in no case exceed fifty years. This subdivision shall not apply to certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. This subdivision shall not apply to certificates of indebtedness or revenue bonds issued in anticipation of the collection of

taxes for amounts to be contained in the taxes for the year next succeeding the year when such certificates or revenue bonds are issued and payable out of such taxes, except that a certificate shall be filed as required by this subdivision before any such certificates or revenue bonds shall be issued.

b. No sale or lease of city real estate or of any franchise belonging to or under the control of the city shall be made or authorized except by vote of three-fourths of all the members of the common council or corresponding legislative body of the city. In case of a proposed sale or lease of real estate or of a franchise, the ordinance must provide for a disposition of the same at public auction to the highest bidder, under proper regulations as to the giving of security and after public notice to be published at least once each week for three weeks in the official paper or papers. A sale or lease of real estate or a franchise shall not be valid or take effect unless made as aforesaid and subsequently approved by a resolution of the board of estimate and apportionment in any city having such a board, and also approved by the mayor. No franchise shall be granted or be operated for a period longer than fifty years. The common council or corresponding legislative body of the city may, however, grant to the owner or lessees of an existing franchise, under which operations are being actually carried on, such additional rights or extensions in the street or streets in which the said franchise exists, upon such terms as the interests of the city may require, with or without any advertisement, as the common council may determine, provided, however, that no such grant shall be operative unless approved by the board of estimate and apportionment in any city having such a board, and also by the mayor.

In any city the question whether any proposed sale or lease of city real estate or of any franchise belonging to or under the control of the city shall be approved, shall, upon a demand being filed, as hereinafter provided, be submitted to the voters

of such city at a general or special election, after public notice to be published at least once each week for three weeks in the official paper or papers. Such demand shall be subscribed and acknowledged by voters of the city equal in number to at least ten per centum of the total number of votes cast in such city at the last preceding general election and shall be filed in the office of the clerk of such city before the adoption of an ordinance or resolution making or authorizing such sale or lease. If such demand is filed, as aforesaid, such sale or lease of real estate or such franchise shall not take effect unless in addition to the foregoing requirements a majority of the electors voting thereon at such election shall vote in the affirmative.

The foregoing limitations shall not apply to the exercise by any city of any power now vested in it, where the existing provisions of law determining by whom or in what manner or subject to what conditions such power shall be exercised are not superseded by the provisions of subdivision one of this section; but in such case the exercise of such power shall be subject only to such existing provisions of law, and shall not be limited or restricted by any provision of this section.

§24. **Construction of this act.** This article shall be construed, not as an act in derogation of the powers of the state, but as one intended to aid the state in the execution of its duties, by providing adequate power of local government for the cities of the state.

§2. This act shall take effect immediately.

Amendment of Executive Law of New York:

"Chap. 442:

AN ACT to amend the executive law, in relation to the duties of the attorney-general in actions involving the constitutionality of a statute.

Became a law May 2, 1913, with the approval

of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article six of chapter twenty-three of the laws of nineteen hundred and nine, entitled 'An act in relation to executive officers, constituting chapter eighteen of the consolidated laws,' is hereby amended by adding thereto a new section, numbered sixty-eight, to read as follows:

§68. Attorney-general to appear in cases involving the constitutionality of an act of the legislature. Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order directing the party desiring to raise such question to serve notice thereof on the attorney-general, and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute.

§2. This act shall take effect immediately."

Code of Civil Procedure of the State of New York, Chapter XVI, Article Third:

Action for a fine, penalty or forfeiture or upon a forfeited recognizance.

* * * * * * *

"§1962. Action for forfeiture, etc.

Where real or personal property has been forfeited, or a penalty incurred, to the people of the State, or to an officer, for their use, pursuant to a provision of law, the *attorney-general*, or the *district-attorney* of the county in which the action is triable, *must* bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought to either, at the election of the attorney-general or district-attorney. A recovery in such an action bars a recovery, in any other action, brought for the same cause,"

Section 255 of The Greater New York Charter, being Chapter 378 of the Laws of 1897, as amended by Chapter 466 of the Laws of 1901 and Chapter 602 of the Laws of 1917:

"Corporation Counsel to be the head of the Law Department; Duties; Salary.

§255. There shall be a law department of The City of New York, the head whereof shall be called the corporation counsel, who shall be the attorney and counsel for the city of New York, the mayor, the board of aldermen and each and every officer, board and department of said city, except as otherwise herein provided. The salary of the corporation counsel shall be fifteen thousand dollars a year. The corporation counsel shall have charge and conduct of all the law business of the corporation and its departments and boards, and of all

law business in which the city of New York is interested, except as otherwise herein provided. He shall have charge and conduct of the legal proceedings necessary in opening, widening, altering and closing streets, and in acquiring real estate or interest therein for the city by condemnation proceedings, and the preparation of all leases, deeds, contracts, bonds and other legal papers of the city, or of, or connected with, any department, board or officer thereof, and he shall approve as to form all such contracts, leases, deeds, bonds and other legal papers; provided, however, that he shall not institute any proceeding for acquiring title to real estate by condemnation proceedings, except for opening streets, unless the same shall have been approved by the board of estimate and apportionment upon a statement to be furnished said board of the valuation of such real estate as assessed for purposes of taxation; and provided, further, that the board of estimate and apportionment shall have power by a majority vote to direct such changes to be made in the forms of contracts and specifications as may seem to promote the interests of the city. He shall be the legal adviser of the mayor, the board of aldermen, the presidents of the boroughs and the various departments, boards and officers, except as otherwise herein provided, and it shall be his duty to furnish to the mayor, the board of aldermen, the presidents of the boroughs and to every department, board and officer of the city, all such advice and legal assistance as counsel and attorney in or out of court as may be required by them or either of them, and for that purpose the corporation counsel may assign an assistant or assistants to any department that he shall deem to need the same. No officer, board, or department of the city, unless it be herein otherwise especially provided, shall have or employ any attorney or counsel, except where a judgment or order in an action or proceeding may affect him or them individually or may be followed by a motion to commit for

contempt of court, in which case he or they may employ and be represented by attorney or counsel at his or their expense. The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties, or to enforce the laws and ordinances. He shall not be empowered to compromise, settle or adjust any rights, claims, demands or causes of action in favor of or against the city of New York, and he shall not permit, offer or confess judgment against the city, or accept any offer of judgment in favor of the city without the previous written approval of the comptroller; provided, however, that this inhibition shall not operate to limit or abridge the discretion of the corporation counsel in regard to the proper conduct of the trial of any action or proceeding, or to deprive such corporation counsel of the powers and privileges ordinarily exercised in the course of litigation by attorneys-at-law when acting for private clients (as amended by L. 1917, ch. 602).

History of the Consolidated Gas Company of New York.

"*History.*—The Consolidated Gas Co. of New York was incorp. Nov. 11, 1884, in N. Y. Companies merged into it were New York Gas Light, Municipal Gas Light, Metropolitan Gas Light, Manhattan Gas Light, Knickerbocker Gas Light and Harlem Gas Light. In December, 1898, a controlling interest in the stock of the New York Mutual Gas Light Co. was acquired. In subsequent years the company acquired control of all the other gas companies and practically all of electric lighting facilities in the Borough of Manhattan, N. Y., as follows: United Electric Light & Power Co. (in 1899), New York Gas & Electric Light, Heat & Power Co., now the New York Edison Company (in 1900), the Standard Gas Light Co. (in June, 1900), New Amsterdam Gas Co. (in 1900), United Electric Light & Power Co. (in 1900), and the Westchester Lighting Co. (in 1904). Owns the entire capital stock of the Astoria Light, Heat and Power Co. of Astoria, L. I. During 1913, the company acquired a majority of the preferred and common stocks of the New York & Queens Electric Light & Power Co. and the entire issue of 6,000 shares of the stock of the New York & Queens Gas Co."

Stock Holdings December 31, 1917, and Percentage of Total Amounts Outstanding.

Consol. Gas Co. Holdings:	Par Value	Per Cent.
N. Y. Edison	$65,953,717	99.98
Astoria L., H. & P.	10,000,000	100.00
N. Y. & Queens Gas	600,000	100.00
N. Y. & Q. El. L. & P.	1,044,000	80.80
Preferred stock	819,800	63.78
N. Y. Mutual Gas Light	1,886,200	54.89
New Amsterdam	12,151,593	99.91
Preferred stock	8,991,475	99.91
Standard Gas Light	4,796,200	96,20
Preferred stock	4,096,100	95.30
United Elec. L. & P.	3,654,145	99.58
Preferred stock	1,641,888	99.58
Westchester Light	10,000,000	100.00
Preferred stock	2,500,000	100.00
Municipal Ltg. Co., Inc.	43,800	.....
New Amsterdam Gas Co.:		
Central Union Gas Co.	3,500,000	100.00
Northern Union Gas	*1,500,000	100.00
New York Edison Co.:		
Cons. Tel. & El. Suby. Co.	†1,869,000	99.71
Brush Elec. Ill. Co.	999,000	100.00

*Includes $760,000 owned by Central Union Gas.

†Includes $200,000 owned by United Electric Light & Power Co.

The Consolidated Gas Co. also held on last accounts $4,818,000 1st Mortgage 5s and $1,000,000 notes of United Electric Light & Power Co., $275,000 Brush Elec. Ill. 5s and $5,000,000 1st Mortgage 5s of Astoria L., H. & Power Co.

Poor's Manual of Public Utilities (1918), p. 1420.

COMPANIES CONTROLLED BY CONSOLIDATED GAS CO.

Astoria Light, Heat & Power Co.—Incorporated Jan. 19, 1899, in New York. On May 10, 1905, absorbed the Citizens Mutual Gas Light Co. of Long Island City (Capital stock, $50,000). * * * (Poor's Manual of Public Utilities, p. 1421).

New Amsterdam Gas Co.—Incorporated Nov. 1, 1897, in New York. Consolidation, March 5, 1898, of the New York and East River Gas Co. and the Equitable Gas Light Co. of New York. Supplies boroughs of Manhattan and Queens, Greater New York, with water gas. Owns and operates in the City of New York, between 135th St. on the north and Canal Street on the south, on both the east and west sides of the City. Also distributes gas in Queens, Long Island City.

Company owns the entire outstanding capital stock of the following companies: New York Carbide and Acetylene Co. ($7,000,000), East River Gas Co. of Long Island City ($1,000,000), Central Union Gas Co. ($3,500,000). Owns also $740,000 of the outstanding $1,500,000 capital stock of the Northern Union Gas Co., the remainder being owned by the Central Union Gas Co. The New York Carbide and Acetylene Co. was acquired as part o fthe property of the consolidating companies on March 4, 1898. It owns patent rights for New York City to manufacture and use carbide. * * * (Poor's Manual of Public Utilities, p. 1422).

Central Union Gas Co.—(Controlled by New Amsterdam Gas Co.)—Incorporated July 13, 1897, in New York. Supplies 23d Ward, Borough of The Bronx, New York, N. Y., with enriched coal gas and water gas. Owns $760,000 of the $1,500,000 capital stock of the Northern Union Gas Co., the remainder being held by the New Amsterdam Gas Co.

Control.—Controlled through ownership of entire capital stock of New Amsterdam Gas Co. * * * (Poor's Manual of Public Utilities, p. 1424).

Northern Union Gas Co. (Controlled by Central Union Gas Co. and New Amsterdam Gas Co.).—Incorporated October 1, 1897, in New York. Supplies 24th Ward, Borough of The Bronx, New York, N. Y., with mixed gas. Owns $25,200 of the capital stock of Wakefield Gas Light Co. (cost on books, $32,500). The Northern Union Gas Co. purchases practically all of its gas from the Central Union Gas Co. * * * (Poor's Manual of Public Utilities, p. 1425).

OTHER COMPANIES CONTROLLED BY THE CONSOLIDATED GAS CO. OF NEW YORK, N. Y.

New York Edison Co. (The)—Incorporated May 1, 1901, in New York, as a consolidation of the New York Gas and Electric Light, Heat and Power Co. and the Edison Electric Illuminating Co. of New York. (For statements of these companies, see Poor's Manual of Railroads for 1900, pages 1077 and 1078). The Consolidated Gas Co. owned the entire capital stock of the former, which, in turn, owned $8,926,500 of the $9,200,000 stock of the Edison Co. The New York Edison Co. supplies the boroughs of Manhattan and The Bronx, New York, N. Y., with electricity. Ownes two large power plants. Practically owns the Mt. Morris Electric Light Co., North River Electric Light and Power Co., Borough of Manhattan Electric Co., New York Light, Heat and Power Co., Block Power and Light Co. No. 1, Yonkers Electric Light and Power Co., Manhattan Lighting Co., Consolidated Telegraph and Electrical Subway Co., Edison Electric Illuminating Co., Manhattan Electric Light Co., Harlem Lighting Co. and Edison Light and Power Installation Co. The company owns nearly all the capi-

tal stock and bonds of the Consolidated Telegraph and Electrical Subway Co., which owns the entire high tension electric wire subway system of the city. Owns also an interest in the Electrical Testing Laboratories Co.

During 1912, the company entered into a 21-year contract with the Third Avenue Railway Co. under which it undertakes to supply the entire requirements of the railway system. This service involves a station capacity of 32,000 kw., or an annual consumption of over 100,000,000 kw. hours. * * * (Poor's Manual of Public Utilities, pp. 1426-1427).

Consolidated Telegraph and Electrical (High Tension) Subway Co. (controlled by New York Edison Co.)—This company is engaged in the construction and leasing of underground ducts or conduits wherein are placed the conductors of companies engaged in the production and use or production and sale of electrical current for light and power delivered over and by high-tension conductors. Operations cover the boroughs of Manhattan and The Bronx. * * * (Poor's Manual of Public Utilities, p. 1430.)

New York Mutual Gas Light Co.—Incorporated April 17, 1866, in New York. Supplies New York City below 63d Street on west side, and below 68th Street on the east side with water gas. Company's charter prohibits it from merging or consolidating with any other gas company. * * * (Poor's Manual of Public Utilities, p. 1431.)

New York and Queens Electric Light and Power Company.—Incorporated July 23, 1900, under the laws of the State of New York, to manufacture and distribute electricity for light, heat and power in the Borough of Queens, City of New York, and also for the adjoining county of Nassau. On July 25, 1900, absorbed by merger the New York and Queens Gas and Electric Co., on July

27, 1900, the Jamaica Electric Light Co. and the Electric Illuminating & Power Co. of Long Island City, and on May 28, 1903, absorbed the Long Island Illuminating Co. Supplies Wards 1, 2, 3 and 4, Borough of Queens, New York, N. Y., with electricity. Under the franchises and contracts, and with the property acquired by the merger above referred to, this company became the sole operating company in the Borough of Queens, except in Ward Five. All franchises are perpetual. Population served, 300,000. * * * (Poor's Manual of Public Utilities, p. 1432.)

New York and Queens Gas Co.—Incorporated July 11, 1904, under the laws of New York. Absorbed Newtown and Flushing Gas Co. Supplies Flushing, College Point, Whitestone and Bayside, N. Y., with water gas. * * * (Poor's Manual of Public Utilities, p. 1433.)

Standard Gas Light Co.—Incorporated January 29, 1886, in New York. Supplies 13th St. north, east and west, to 159th St., New York, N. Y., with illuminating water gas. * * * (Poor's Manual of Public Utilities, p. 1434.)

Westchester Electric Co.—Incorporated November 5, 1900, in New York, to supply gas and electric light. Company absorbed a number of electric lighting and gas companies, described in Ind. Man. for 1911, page 2055. In September, 1908, the company acquired all of the stock ($804,000) and $90,000 first mortgage bonds of the Northern Westchester Lighting Co. and part of the stock ($500,000 common and $75,000 preferred) of the Peekskill Lighting and Railroad Co.

Formerly controlled by the United Gas Improvement Co. of Philadelphia. On July 11, 1904, New York and Westchester Lighting Co. was formed, with a nominal capital of $250,000 and acquired control of the Westchester Lighting Co., issuing its own bonds in exchange

for an equal amount of stock of the latter company. The property was transferred to the Westchester Lighting Co. in October, 1904. Afterwards the Consolidated Gas Co. of New York purchased, through the Westchester Lighting Co., the properties of the New York and Westchester Lighting Co. On October 30, 1904, the Westchester Lighting Co. and the New York and Westchester Lighting Co. were merged. The Consolidated Gas Co at the same time assumed $2,500,000 5 per cent. debenture bonds, issued by the New York and Westchester Lighting Co., and a junior obligation to the general mortgage 4 per cent. bonds of that company. The company supplies gas and electricity to that part of Westchester County north of the northern limits of New York City, to North Tarrytown and Mount Kisco, including Yonkers, Mamaroneck, New Rochelle, Mount Vernon, Port Chester, Harrison, Rye, North Pelham, Pelham Manor, Pelham Heights, Village of Pelham Manor, Village of North Pelham, Village of Pelham, and Town of Kingsbridge. Also has franchises for a large portion of the Borough of The Bronx. Population served, 200,000. Owns six gas plants and seven holders, with a total daily capacity of 11,540,000 cubic feet and three electric stations, with a capacity of 9,435 kw. * * * (Poor's Manual of Public Utilities, p. 1436.)

COMPANIES CONTROLLED BY WESTCHESTER LIGHTING CO.

Northern Westchester Lighting Company (controlled by Westchester Lighting Co.).—Incorporated in May, 1905, in New York, as a consolidation of Northern Westchester Light and Power Co., Ossining Heat, Light and Power Co., and Briarcliff Manor Light and Power Co., and is the owner of the franchises and privileges of the Sing Sing Electric Lighting Co., Sing Sing Gas Mfg. Co., and the Croton Electric Light and Power Co. Supplies Ossining, Croton, Cortlandt, Mt. Pleasant, Briar-

cliff Manor, Sherman Park and Pleasantville, and a portion of Yorktown in Westchester County, N. Y. Population served, about 40,000. * * * (Poor's Manual of Public Utilities, p. 1438.)

Peekskill Lighting and R. R. Co.—Length of track, 10.29 m.; 2d track, 0.35 mile. Gauge, 4 ft. 8½ in. Rail (T), 56 lbs.; girder, 80 to 108 lbs. Motor cars (box, 7; open, 10; semi-convertible, 6), 23; work, 1; coal, 2; combination freight car and snow plow, 1; snow plows, 2; total 29. Power station, 1; engines to generate power, 2.

History.—Incorporated July 12, 1900, under the Laws of New York, as the Peekskill Lighting Co., subsequently purchased the properties of the Peekskill Electric Light and Power Co., the Peekskill Gas Light Co., and the Peekskill Traction Co. (see Manual of Railroads for 1902, page 994). Name changed on August 30, 1900, to the above title. Comprises electric light, power, gas and railroad properties in Peekskill and vicinity. Electric and street railway franchise perpetual; gas franchises liberal. Operates Putnam and Westchester Traction Co. under contract. * * * (Poor's Manual of Public Utilities, page 1439.)

COMPANY OPERATED UNDER CONTRACT BY PEEKSKILL LIGHTING AND R. R. CO.

Putnam and Westchester Traction Co.—Peekskill to Oregon, N. Y., 4.35 miles, of which 1.12 miles on private right-of-way. Rail, 56 to 96 lbs. Gauge, 4 ft. 8½ in.

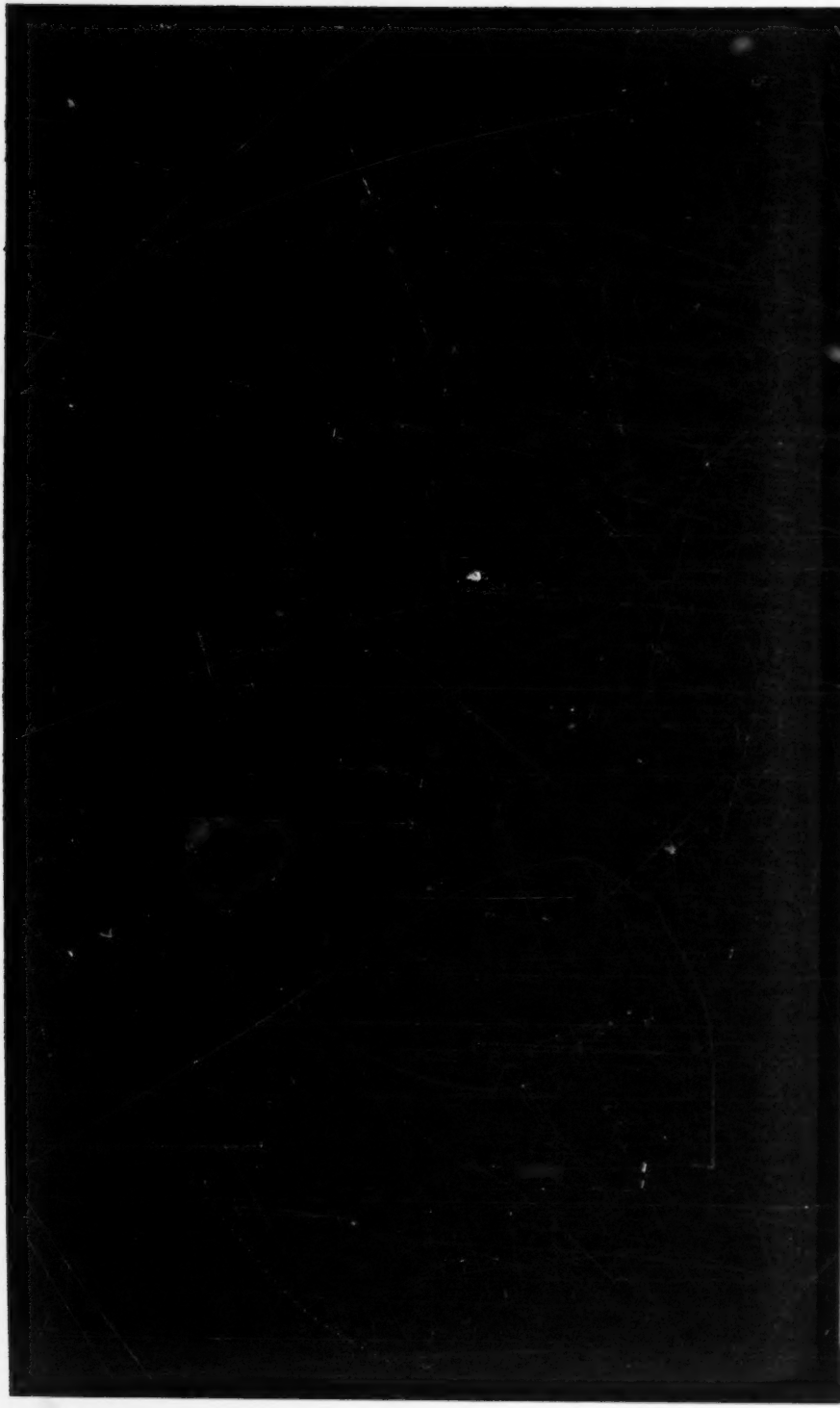
History.—Chartered July 14, 1906, under the laws of New York. Work on the construction of the road was begun at Peekskill, N. Y., on December 13, 1906, and was completed to Courtlandville, and first car run March 25, 1907. Road operated by the Peekskill Lighting and Railway Co. under contract. * * * (Poor's Manual of Public Utilities, page 1440.)

OTHER COMPANIES CONTROLLED BY CONSOLIDATED GAS CO. OF NEW YORK.

United Electric Light and Power Co. (The).—Incorporated in 1887, in N. Y. as The Safety Electric Light and Power Co. Name changed as above in 1889. The United States Illuminating Co. was merged with this company under date of June 19, 1902. Owns the majority of the capital stock of The Brush Electric Illuminating Co. of New York, and 2,000 shares of stock, $100 par, of the Consolidated Telegraph and Electrical Subway Co. (book value, $50,000), and 1,295 shares of stock ($100 par) of the Ball Electrical Illuminating Co. (book value, $2).

Company in 1914, in conjunction with the New York Edison Co., entered into a contract to supply power for the westerly end of the New York, New Haven and Hartford R. R. and also for the New York, Westchester & Boston Ry. Co. This contract involved the installing of additional generating capacity. * * * (Poor's Manual of Public Utilities, p. 1440.)

Brush Electric Illuminating Co. (controlled by United Electric Light and Power Co.).—Incorporated in 1881, in New York. Supplies electricity in Borough of Manhattan. Franchise perpetual. Operations allowed by franchises in Boroughs of Manhattan and the Bronx. * * * (Poor's Manual of Public Utilities, p. 1441.)



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LIST OF CASES.

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

BRIEF FOR APPELLEE.

Statement.

Appeal from an order of the Circuit Court of Appeals, Second Circuit, unanimously affirming an order of the District Court for the Southern District of New York, which denied the petition of the City of New York for leave to intervene as a party defendant in this cause.

The suit was brought to enjoin the enforcement of the so-called "Eighty-cent law" of New York (L. 1906, Ch. 125, limiting the price of gas to private

consumers in the Borough of Manhattan to eighty cents per thousand cubic feet), on the ground that the rate is confiscatory and, therefore, deprives the complainant of its property without due process of law.

In a previous suit by the complainant to have the Eighty-cent law declared invalid, this Court upheld the validity of the Act upon the evidence then before it, but left it open to the complainant to bring another suit in the future, if, after a reasonable trial, the rate proved to be confiscatory (Willcox *v.* Consolidated Gas Company, 212 U. S. 19). In that suit, the validity of another statute (L. 1905, Ch. 736), which prescribed a separate maximum rate of seventy-five cents per thousand cubic feet for gas supplied to the City of New York, was also attacked, and the City was, therefore, made a party defendant. In the present suit, that statute is not attacked; and the application of the City for permission to intervene was not for the purpose of protecting any direct interest of its own as a consumer, or to perform any duty imposed upon it by law, but only for the purpose of protecting individual consumers, on the general theory that it is entitled to act in such matters for the "general welfare" of its citizens.

The District Judge, in denying the petition, pointed out in his opinion (Record, pp. 19-27), that the private consumers were already properly and completely represented by the Public Service Commission, the Attorney General and the District Attorney, and that as the City had no interest in the litigation as a consumer and was not the governmental body which had established the rate and was not charged with the duty of enforcing it, it was neither a necessary nor a proper party and could not be permitted to intervene, under Equity Rule 37, as a party having "an interest in the litigation". He, therefore, denied the application to intervene as a matter of law (Record, pp. 28, 29).

POINTS.

FIRST.

Motion to dismiss.

A separate memorandum has been submitted, in connection with the motion to dismiss the appeal on the following grounds:

1. That the order is not appealable;

2. That even if the City might be considered a proper party, its application to intervene was addressed to the discretion of the court and cannot be reviewed;

3. That the entire question has become moot and academic, because the City, as a matter of fact, has been represented by its Corporation Counsel throughout the litigation and has actively participated in the trial of the case, which has now been concluded.

SECOND.

Parties defendant.

As Judge Mayer pointed out in his opinion in the District Court (Record, pp. 19-27), all of the public authorities charged with any duty in connection with the enforcement of the Eighty-cent Act were made parties defendant: the Public Service Commission, First District, the Attorney General and the District Attorney of New York County.

A complete copy of the Public Service Commissions Law (L. 1906, Ch. 429) is submitted herewith, showing the very broad regulatory powers conferred upon the Commission. The imperative duty is laid upon the Commission of enforcing, by summary

proceedings, all laws affecting gas and electric corporations and municipalities operating such utilities (Sec. 74).

The Attorney General and the District Attorney are charged with the duty of enforcing the penalties prescribed by the statute.

Code Civ. Pro., Sec. 1962.

(A copy of this Section is appended to the appellant's brief, p. 64.)

Section 68 of the Executive Law provides for the appearance of the Attorney General in all cases involving the constitutionality of an Act of the legislature.

(A copy of this Section is appended to the appellant's brief, p. 63.)

THIRD.

The application for a writ of certiorari.

The present appeal was taken on September 23, 1919 (Record, p. 34). On October 6, 1919, the appellant applied to this Court for a writ of *certiorari* to review the order from which the appeal had been taken. The application was denied (250 U. S. 671). It could have been made only under Section 240 of the Judicial Code, upon the theory that no appeal would lie from the order of the Circuit Court of Appeals. The application thus plainly indicates that the appellant's counsel had no faith in the appeal taken.

FOURTH.

The general welfare argument.

Section 255 of the City Charter is cited by the appellant (Brief, pp. 40, 64) as authority for the Corporation Counsel to represent the City in every case where its rights, or the rights "of the people thereof" are involved; and the so-called Home Rule Bill is also cited (pp. 41, 53), to show the very broad powers conferred upon the cities of the State in the management of their general affairs.

I. Section 255 has reference to the property rights and interests of the municipality, in its corporate capacity; and the phrase, "the people thereof", refers to the collective rights of those who constitute the community, and not to the several individuals or persons in the community. The much abused word "people" is here employed in its proper sense, as signifying the entire body of citizens or the community as a whole; and it was not intended to make the "Corporation" Counsel the private counsel of all the inhabitants, to enforce their separate and individual rights. In his zeal to represent "the people", the learned Corporation Counsel overlooks the fact that the Public Service Commissions Law provides for the employment by each Commission of a general counsel, at a salary of $10,000 a year, with power to appoint additional attorneys and counselors as associates (Secs. 6, 12, 13): an unnecessary burden upon the taxpayers, if the duty rests upon the Corporation Counsel.

II. Counsel for the appellant answered their own argument as to the meaning of the word "people" in their original petition to intervene, in which they quote from the opinion of the New York Court of

Appeals, in Interborough Railway Co. *v.* Rann (Record, pp. 4-5):

> "As a legal conception, a community is an entity distinct from its inhabitants, but it remains a local community and body of persons, the sum total of its inhabitants and the proper custodian and guardian *of their collective rights.*"

III. The so-called Home Rule Bill is applicable to all the cities of the State, and not merely to New York City. No power is conferred upon municipalities by that Act, which in any way conflicts with the regulatory powers specifically conferred upon the Public Service Commission. The argument of counsel on this point would lead to the conclusion that, in spite of the explicit provisions of the Public Service Commissions Law, all the cities of the State have coordinate control in the regulation of their public utilities.

IV. The right of the Attorney General to defend a statute which is attacked as unconstitutional is conferred by Section 68 of the Executive Law (appellant's brief, p. 63). Counsel for appellant argue that, as Section 68 is part of the general law and as Section 255 of the City Charter is part of a local statute, the former must yield to the latter; and they "assert in all confidence" (Brief, p. 28), "that the general state law must yield to the special local law."

If they had borne that principle in mind, they would have concluded that the general provisions of the City Charter, and the general State law known as the "Home Rule Bill", must yield to the specific provisions of the Public Service Commissions Law.

V. It is not only the Attorney General's right, under Section 68 of the Executive Law, to defend the statute, but it is his duty, under Section 1962

of the Code of Civil Procedure (appellant's brief, p. 64), to enforce the penalties incurred for a violation of the statute.

VI. It is inconceivable that the legislature intended, by the Public Service Commissions Law, to establish a dual system for the regulation of public utilities, one by the municipality and the other by the Commission. Dual regulation by two different bodies, with different views on the subject, would be altogether impossible. The Public Service Commissions Law, however, makes it entirely clear that nothing of the sort was intended, as Section 127 provides that "all other acts and parts of acts otherwise in conflict with this Act are hereby repealed."

VII. How completely the City is subordinated to the Commission is manifest throughout the Public Service Commissions Law (Sections 65, 66, 67, 68, 71, 74).

Thus, Section 71 provides that a complaint may be filed by the mayor of a city with the Commission, as to the quality, pressure or price of gas, and, thereupon, the Commission shall make an investigation of the facts. In other words, the power of the city is limited to bringing any case of the infraction of the law to the attention of the Commission.

The Act contemplates the possibility that municipalities in the State may themselves operate gas and electrical properties, and, in that connection, it places them in the same class as privately operated companies. They cannot, for instance, engage in such business at all, without first obtaining a certificate of public necessity and convenience (Sec. 68). If, with the permission of the Commission, they do operate gas or electrical properties, the Commission is required to see that they comply

with the law and with the orders of the Commission (Sec. 74). In other words, the legislature has not provided for a dual system of regulation, but has placed one body in supreme control of all the public utilities of the State, even to the extent of expressly placing the municipalities themselves under such control. The Court of Appeals has recognized that in the case of rates to be charged by a gas company, complete and exclusive jurisdiction has been conferred on the Commission, even where the rate was originally established by the municipality.

> People *ex rel.* S. Glens Falls *v.* Public Svce. Com., 225 N. Y. 216.

VIII. That the City, as such, has no duty and not even any right to represent the private consumers in a rate case, was expressly decided by the Appellate Division of the New York Supreme Court, in connection with the very statute which is the subject of the present litigation.

> Richman *v.* Consolidated Gas Co., 114 App. Div., 216.

In that case, the Court somewhat impatiently said (p. 224):

> "Of course, the City of New York does not represent the private consumers and it cannot appear for them in the litigation in a Federal Court."

In City of Mount Vernon v. New York Interurban Water Company (115 App. Div. 658), the Court said (p. 662):

> "So far as the action seeks a judicial scrutiny of the rates as unreasonable to the private consumers, I think it cannot be maintained. The municipal corporation has not such legal concern or interest in the relations of the company and the individual consumers as warrants the bringing of such a suit."

FIFTH.

The Public Service Commission, First District, is the representative of the City.

A municipal corporation is entirely the creature of the legislature; and its functions are such only as the legislature prescribes.

People *ex rel.* S. Glens Falls *v.* Public Svce. Com., 225 N. Y. 216, 223;

Pawhuska *v.* Pawhuska Oil Co., 250 U. S. 394, 399.

If the legislature delegates to the municipality the power to make rates for public utilities and to enforce such rates, the municipality is, of course, the proper party to any litigation in which the rates are involved; and this was the situation in every case cited by the appellant where the municipality was a party. But when a municipality expands into a great metropolis, the ordinary municipal agencies are unequal to the manifold duties resulting from the vest network of activities, and, as a consequence, the legislature creates numerous independent boards and commissions and turns over to them various duties and functions ordinarily delegated to the municipality. It was for this reason that, by the Public Service Commissions Law, the legislature divided the state into two districts, one coincident with the City of New York, known as the First District, and the other comprising the remainder of the State, known as the Second District (Sec. 3); and it appointed a separate Commission for each District.

The Commission for the First District is thus the actual and sole representative of the City in matters affecting the public utility corporations.

SIXTH.

A decisive test.

I. If the City of New York had been made a party defendant in the original bill of complaint, it is clear that it would have been entitled to a dismissal of the bill as to it, because no cause of action or ground for equitable relief against it is shown in the bill.

A suit of this kind, to restrain the enforcement of a statute, will lie only against those who have been charged by law with some special duty in connection with the statute.

> Fitts *v.* McGhee, 172 U. S. 516, 529:
> *Ex parte* Young, 209 U. S. 123, 156-8.

In *Ex parte* Young, this Court, distinguishing Fitts v. McGhee, said (p. 158):

> "The officers in the Fitts case occupied the position of having no duty at all with regard to the Act and *could not properly be made parties to the suit* for the reason stated.

The officers thus referred to were the Governor and the Attorney General of the State; but the Court held that, as no positive duty was laid upon them to enforce the statute, the mere fact that they were charged generally with the execution of all the laws of the State was not sufficient to enable the suit to be maintained against them; and in the Young case, referring to these officers, the Court said (p. 156):

> "A state superintendent of schools might as well have been made a party."

So, in the case at bar, if it were conceded, for the sake of the argument, that the City had a general interest in seeing that all the laws affecting its inhabitants were enforced, this would place no duty

upon it which would justify an action to restrain it from enforcing a particular statute.

II. The principle of the Fitts and Young cases was applied by this Court in *In re* Engelhard (231 U. S. 646), where the Court said (p. 651):

> "It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

The rate in that case had been made by the municipality, and it had the duty of enforcing it.

III. As this Court recognized in the Young case (*supra*), there is no more propriety in making the City a party defendant than there would be in making the County of New York, or a school district, or any other public agency or instrumentality which happened to cover the same territory.

SEVENTH.

A needless alarm.

Counsel for the appellant express concern over the possible fate of the Act giving the City a seventy-five cent rate (L. 1905, Ch. 736), in case a decision should be rendered in this suit in favor of the complainant. That Act was attacked in the previous litigation (212 U. S. 19) as discriminatory; but this Court thought there was justification for the discrimination, in the fact that the City was a wholesale consumer; and it held that, so long as the Company derived an adequate return from

its entire business, the price to the City was immaterial; and as to this, the Court said (p. 54):

> "The only interest of the complainant in the question is to find out whether by the reduced price to the City, the complainant is, upon the whole, unable to realize a return sufficient to comply with what it has a right to demand * * *. So long as the total is enough to furnish such return, it is not important that, with relation to some consumers, the price is not enough."

As a result of that decision, no attack has been made upon the Seventy-five cent Act in the present suit; and the record affirmatively shows that no attack will be made upon it (Record, p. 18).

The City now argues, however (Brief, p. 42), that it should be made a party defendant, because an attack *may* be made on the seventy-five cent rate at some time in the future and a decree in the present case in favor of the complainant *might* be prejudicial to it. But if the Eighty-cent Act should be declared void, the Company will be free to fix a rate which will ensure it an adequate return from its private consumers, and if it obtains such a return, there will be no possible ground for an attack upon the rate to the City, as this Court expressly declared in the language above quoted.

EIGHTH.

Some comments on the appellant's brief.

I. The appellant's brief is not strictly confined to the record. Nine pages (67-75) are occupied with an alleged history of the complainant, said (p. 3) to have been extracted from Poor's Manual.

An assertion contained in the brief (p. 4) is based on something which is said to have appeared in an affidavit filed by the District Attorney in the lower court, in another proceeding and forming no part of the present record.

Statements are made (p. 19) of what the Public Service Commission has done in other cases, without any reference to any record or report where such statements might be found.

II. Carelessness of statement is seen in such assertions (p. 21) as that the question of the complainant's special franchises was left undecided in the previous litigation (212 U. S. 19). But the record in that case shows that the Circuit Court expressly held that the complainant did have perpetual franchises (157 Fed. 849, 880); and this Court allowed the complainant to include in its property, upon which it was entitled to earn a return, the sum of $7,781,000, representing the amount at which the special franchises had been capitalized in 1884 (212 U. S. 19, 46-47).

III. Counsel reproach the Public Service Commission because it endeavors to act with some degree of consistency and some regard to its official decisions. Thus, they say (p. 19):

> "That body feels more or less bound by the decisions which it renders. Thus, when matters of appraisals or valuations come up, the

> Commission feels that it is limited and restricted by the findings made by the same body at some earlier period"!

Counsel evidently have no respect for the honored doctrine of *stare decisis.*

IV. In arguing that the City has a right to protect the interests of its citizens, counsel overlook the fact that the Public Service Commission for the First District (that is, for the City of New York) is just as much a part of the machinery of the municipality for the protection of its citizens as is the Corporation Counsel himself.

V. In the petition to intervene (Record, pp. 2-9), as well as throughout the appellant's brief, it is made perfectly clear that the sole object which the City has in view in intervening in this cause is to oppose in every possible way the attack which the complainant has made upon the statute limiting the price of gas to eighty cents.

This attitude of the City is said by counsel (Brief, p. 32) to be in complete harmony and conformity with the requirement of Equity Rule 37 of this Court, that "the intervention shall be in subordination to and in recognition of the propriety of the main proceeding." In other words, the City subordinates itself to the claim made by the complainant, by opposing it and seeking to defeat it; and it recognizes the propriety of the position taken in the bill of complaint, by endeavoring to show that this position has no merit, is entirely unfounded and should not be sustained!

VI. *Authorities relied upon.*

In all the cases cited by the appellant as authority for the proposition that a municipal corporation is a proper party, the power and duty of regulation were conferred upon the municipality.

In not one of them had this power been conferred upon a separate commission.

VII. Provisions of the New York Constitution are set forth at great length (Brief, pp. 50-1), to show that local bills affecting cities of the first class must be submitted to the mayor for approval; and because the Eighty-cent Act was thus approved, the question is triumphantly asked (p. 10):

> "Then does it not follow that the City is both a necessary and proper party in an action to have this Act declared invalid?"

VIII. The climax of the appellant's argument is reached in the last point (p. 45), where it is gravely suggested that when the District Court denied the application of the City for leave to intervene, it deprived the City of its property without due process of law, in disregard of its constitutional rights!

IX. The municipal authorities evidently fail to see why anyone should object to their injecting themselves into this litigation. But the bill of complaint shows (Record, p. 14) that the daily average loss of the complainant from its gas business, below a return of only six per cent. upon its investment, is about $14,000; and this Court has recently announced that even a six per cent. return, under existing conditions, is not necessarily adequate.

Lincoln Gas Co. *v.* Lincoln, 250 U. S. 256.

In the affidavit made on the complainant's motion to dismiss the pending appeal, it is shown that the zeal of the Corporation Counsel, as solicitor for the District Attorney in the conduct of this litigation, has led him to consume much more of the time of the Court than the counsel for the Commission and the Attorney General put together

(pp. 15-16). The inevitable result has been what the Court saw was likely to happen, in Gregory *v.* Pike (67 Fed. 837), where the Court said:

> "Complainants should not be compelled into litigation with parties not of their own seeking. One may commence a proceeding very simple in its nature and be content to take the risk of it; but if other persons can force themselves into the litigation, what he conceives to be simple may become complicated, expensive and interminable."

NINTH.

The appeal should be dismissed, or the order appealed from should be affirmed.

WASHINGTON, April 12, 1920.

JOHN A. GARVER,
Counsel for Appellee

No. 566

Supreme Court of the United States.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

Brief of the City of New York in Answer to Appellee's Brief to Dismiss.

JOHN P. O'BRIEN,
Corporation Counsel.

Stillman Appellate Printing Company, 200 William Street, N. Y. C.

Supreme Court of the United States.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

BRIEF OF THE CITY OF NEW YORK IN ANSWER TO APPELLEE'S BRIEF TO DISMISS.

ANSWER TO POINT MARKED "FIRST."

I. The order appealed from is a final order.

The making of this final order was a determination or adjudication of a substantial right against

the appellant in such manner as to leave it no adequate relief except by recourse to an appeal.

Gay vs. Hudson River El. Co., 184 Fed., 689;
Matter of Farmers' L. & T. Co., 129 U. S., 206;
Brush Electric Co. vs. Electric Imp. Co., 51 Fed., 557, 561.

The right of the City to represent its inhabitants and also its right to represent its own interest through its Corporation Counsel, is a substantial and constitutional right entitled to the protection of the Courts. The order appealed from impaired this substantial right of the City and, therefore, it is a final order.

Central Trust Co. of N. Y. vs. Chicago R. I. & P. R. R. Co., 218 Fed., 336;
Odell vs. Batterman, 223 Fed., 292;
Gas & Electric Securities Co. vs. Manhattan & Queens Traction Corporation, decided by the Circuit Court of Appeals for the Second Circuit, Feb. 24, 1920;
(A copy of which opinion is submitted herewith.)

II. The cases mentioned by appellee on page 5 of its Brief are not in point.

Ex parte Cutting was an application for a writ of mandamus commanding the judges of the Circuit Court to allow petitioner an appeal from the

decree in the cause and a *supersedeas*. No appeal was asked of the Circuit Court as a party to the suit. The petitioner sought only to become a party to the appeal. Mr. Chief Justice WAITE said:

> "They filed their petition to be made defendants in the suit, but it was never granted. Not only was no express order made to that effect, but there is nothing to show that they were ever in any manner recognized as parties, or that they ever supposed they were parties" (94 U. S., 14, 20).

In *Credits Commutation Co. vs. United States*, the petitioner's right was, in the language of the Court, " * * * nothing more than a contingent, speculative, future possibility."

Ex parte Leaf Tobacco Board of Trade was a case where the petitioners, instead of appealing from the order refusing to allow petitioner to become a party defendant, sought by mandamus to have the judgment in the case reviewed and the Court held that "one who is not a party to the record and judgment is not entitled to appeal therefrom."

III. The instant case is in no way analogous to the foregoing.

The consumers are not represented either in their collective or in their individual capacity in the present case, nor is The City of New York, who is the greatest single consumer of appellee, represented. The interest of The City of New York is a substan-

tial interest and not a mere contingent, speculative and future possibility as was the interest of the petitioner in the Credits Commutation Company case, *supra*. The City has a real, substantial interest and right to defend itself and also to defend its inhabitants who are consumers in their collective capacity. The order refusing the City the right to become a party affects a substantial constitutional right of The City of New York and the people of The City of New York who are consumers of appellee and, therefore, the order is a final order and appealable.

As late as the year 1916 the Legislature of the State amended Chapter 125 of the Laws of 1906 by Chapter 604 of the Laws of 1916, which act was under the Constitution accepted by the City and this shows how directly and immediately the acts in question affected the "affairs" of The City of New York (see Appendix).

There is also submitted herewith a copy of an opinion by Justice Samuel Greenbaum in *Jamaica Gas Light Co. vs. Nixon*, wherein he holds, under Section 452 of the Code of Civil Procedure, which is substantially the same as Rule 37 of the Federal Equity Rules, that The City of New York is both a necessary and proper party to a suit brought in the State Court for a decree declaring unconstitutional the acts in question. This decision is authority that The City of New York is a proper party for a complete determination of an action brought to test the constitutionality of a statute fixing a rate for gas.

ANSWER TO POINT "SECOND."

I. In representing the District Attorney the Corporation Counsel was not representing The City of New York. The District Attorney is a county officer. Nor can such representation be construed as an appearance for the People of The City of New York in their collective capacity. The City has the authority to appropriate money for the expenses of The City of New York and its inhabitants. Such authority, however, does not extend to the appropriation of moneys to support the defense of a *county officer* such as the District Attorney. The present suit resolved itself into a battle of experts, and owing to the fact that The City of New York was not a party, the Corporation Counsel was unable to obtain the money necessary to procure valuable expert testimony which was essential to a thorough defense of this suit. Moreover, the Corporation Counsel, owing to the fact that the City was not a party and to the lack of funds due to that fact, was unable to have such experts as he could procure spend sufficient time in an examination of the books and properties of the complainant which was so necessary to a proper presentation of the defense of this suit.

II. Moreover, the District Attorney may not authorize an appeal from the judgment entered herein if the same be against the constitutionality of the act involved, for the reason that according to recent authorities, both of the Supreme Court of the United States and of the State of New York, penalties may not be enforcible during the time the

constitutionality of a rate statute is in litigation. This was pointed out in a very learned decision of the Appellate Division of the Supreme Court of the State of New York in *Bronx Gas and Electric Company, Appellant, vs. Public Service Commission of the State of New York, First District.*

180 N. Y. Supp., 38.

There is also the question whether the State of New York will appropriate further money for the appeal from any decree entered in the present case and also whether the Attorney General will have sufficient funds to carry on such an appeal. There is nothing in the Public Service Commissions Law which directs the Public Service Commission to appeal from any judgment that may be entered in this case, and it is questionable whether under the law it is the duty of the Public Service Commission to appeal to the Supreme Court of the United States if the decree be against the constitutionality of the law.

It, therefore, appears that the interests of The City of New York and of its inhabitants have not been and may not in the future be represented and protected in this litigation.

The quotation from the case of *Richman vs. Consolidated Gas Co.*, 114 App. Div., 216, in appellee's brief (p. 8) to the effect that The City of New York does not represent private consumers, is not in point here for the reason that in the original Consolidated Gas Company of New York litigation The City of New York was made a party because complainant attacked the constitutionality of Chapter 736 of the Laws of 1905, which provided for a rate

of 75 cents per 1,000 cubic feet for gas supplied to the City, and The City of New York did not expressly undertake in that litigation to represent the consumers who were the inhabitants of the City.

ANSWER TO "FOURTH" POINT.

I. The constitutionality of the Eighty Cent Act (Chapter 125 of the Laws of 1906) necessarily involves the constitutionality of the Seventy Five Cent Act (Chapter 736 of the Laws of 1905). If the former should be declared unconstitutional, then the company might fix a rate of $1.50 or $2.00 a thousand cubic feet and the private consumers would then have the right to claim that they were discriminated against in favor of the City. Thus, the present litigation necessarily involves the constitutionality of Chapter 736 of the Laws of 1905.

II. The fact that the appellee states that it had no intention of attacking the Seventy Five Cent Act, cannot prevent the consumers from setting up and claiming that the Seventy Five Cent Rate in favor of the City is discriminatory as against them and that therefore it is unconstitutional. The fact that the validity of the Seventy Five Cent rate was established in the previous litigation (212 U. S., 19, 54) cannot affect the discriminatory character of the Seventy Five Cent rate so far as the present litigation is concerned. The 500,000 individual consumers of the company certainly have an interest in this litigation and they expect the City of New York, through its Cor-

poration Counsel, to defend that interest, and for this reason we find not a single consumer or civic body has made any attempt to become a party to this litigation.

Actions have also been brought by the following gas companies operating within The City of New York to have declared unconstitutional said Chapter 125 of the Laws of 1906, to wit:

1. East River Gas Company of Long Island City.

2. The New York Mutual Gas Light Company.

3. Northern Union Gas Company.

4. Central Union Gas Company.

5. The Standard Gas Light Company of The City of New York.

6. New Amsterdam Gas Company.

7. Brooklyn Union Gas Company.

8. New York and Queens Gas Company.

9. Newtown Gas Company vs. Nixon and others.

10. Woodhaven Gas Light Company vs. Nixon and others.

The City of New York has not been made a party to any of these suits and the actual trials thereof have not yet been commenced.

It is my purpose as Corporation Counsel of the City of New York to make a motion in each of said

suits in the District Court of the United States for the Southern District of New York in which district said suits are now pending for an order of said Court permitting The City of New York to be made a party defendant therein similar to the motion made in the above entitled case which was denied by Judge Julius M. Mayer, District Judge of the Southern District of New York, and which order was confirmed by the Circuit Court of Appeals for the Second Circuit and from which said order of confirmation the above entitled appeal was taken.

In fact in the Brooklyn Union Gas Company case I have already made such a motion and it has been denied and I have taken an appeal directly to this Court from the final order denying my petition to become a party in that case.

The fact that the present suit is finished is unimportant for the reason that the *City should be a party on the record on appeal.*

Moreover, the right of the City and its inhabitants to be represented as parties in the above ten cases depends on the outcome of this appeal.

The questions therefore involved in this appeal are neither abstract, hypothetical or moot, and are closely connected with the granting of actual relief both to the City of New York and its inhabitants who are consumers of the appellee and both to the City and to such consumers practical relief will follow the determination of this appeal in their favor. There is a legal, substantial right both of the City and of its inhabitants to be decided in this appeal.

It is respectfully submitted that the final order of the District Court as affirmed by the Circuit Court of Appeals should be reversed.

Dated April 17, 1920.

JOHN P. O'BRIEN,
Corporation Counsel.

VINCENT VICTORY,
Of Counsel.

APPENDIX.

"CHAP. 604.

AN ACT to amend chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," in relation to price of gas to consumers in such city.

Became a law May 18, 1916, with the approval of the Governor. Passed, three-fifths being present.

Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions one, two and three of section one of chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," are hereby amended to read, respectively, as follows:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brook-

lyn and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second, third and fourth wards of the borough of Queens, and the borough of Richmond, one dollar.

§2. This act shall take effect July first, nineteen hundred and sixteen."

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

Notice of motion to dismiss appeal.

TAKE NOTICE, that, on April 12, 1920, at 12 o'clock noon or as soon thereafter as counsel can be heard, in the Supreme Court Room, Washington, D. C., the Complainant-Appellee above named, will move this Court on the record and on all the proceedings had herein and on the annexed affidavit of Charles A. Vilas, verified March 20, 1920, and accompanying brief to dismiss the above entitled appeal, on the following grounds:

I. For want of jurisdiction in this Court to determine the same, in that the order ap-

pealed from, which affirmed an order denying the appellant's petition for leave to intervene as a party defendant in the above entitled cause, was not a final order and, therefore, is not subject to review.

II. For want of jurisdiction in this Court, in that the appellant, having no property or other legal interest in the said cause giving it a legal right to intervene as a necessary party thereto, the order of the District Court of the United States for the Southern District of New York, which denied the appellant's petition for leave to intervene, and which was affirmed by the order appealed from, was discretionary and therefore is not subject to review.

III. That it is manifest that the appeal from the said order is taken only for delay, and that the questions on which the appellant bases the said appeal are so frivolous as to require no further argument.

IV. That the questions involved in this appeal have become academic and moot, because the trial of the cause in which the appellant sought to intervene has been concluded, and the appellant, though not a formal party to the said cause, was fully and adequately represented at the said trial, and its rights and interests, if any, in the said cause, were duly protected.

New York, March 20, 1920.

JOHN A. GARVER,
Counsel for Appellee,
55 Wall Street,
New York.

To

WILLIAM P. BURR, Esq.,
Corporation Counsel of the City of New York
and Solicitor for Appellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

BRIEF FOR COMPLAINANT-APPELLEE IN SUPPORT OF MOTION TO DISMISS.

Motion by the complainant-appellee to dismiss an appeal from an order of the Circuit Court of Appeals, Second Circuit, unanimously affirming an order of the District Court which denied the petition of the City of New York for leave to intervene as a party defendant in the above entitled cause.

On October 6, 1919, the City applied to this Court for a writ of *certiorari* to review the said order from

which the said appeal had previously been taken. The application was denied by this Court on October 20, 1919 (250 U. S., 671).

The suit was brought by the complainant, the Consolidated Gas Company of New York, to have the so-called "Eighty-cent Gas Act" of New York (L. 1906. Chap. 125), which limits the price of gas to be charged to private consumers in the City of New York to eighty cents per thousand cubic feet, declared void, on the ground that the rate is confiscatory and therefore deprives the complainant of its property without due process of law.

POINTS.

FIRST.

The order appealed from is not subject to review.

I. No decision of this Court has been found, in which an order of a lower court denying a petition to intervene in an action pending in such court has been held to be reviewable. A case of this kind is to be distinguished from the cases in which an outside party has been permitted to intervene and has filed a claim to property in the custody of the Court and the claim has been denied on the merits. An order denying such a claim is, of course, a final order, disposing absolutely of property rights of the claimant and is, therefore, appealable. This is quite different, however, from the question whether an outsider shall be permitted to intervene and become a party to an action, when such intervention is objected to by some or all of the existing parties. This Court has always held that question to be within the discretion of the trial court and not subject to review.

Ex parte Cutting, 94 U. S., 14, 22;
Credits Commutation Co. *v.* U. S., 177 U. S., 311, 315;
Ex parte Leaf Tobacco Board of Trade, 222 U. S., 578, 581;
In re Engelhard, 231 U. S., 646.

II. Although the District Court in this case stated that it denied the petition as a matter of law and not of discretion (Record, p. 29), this statement is not controlling, if the petition to intervene

was necessarily addressed to the discretion of the court; because, the petitioner failed to show that it had a legal right to intervene or that it had any property interest involved in the litigation. Practically the same situation was presented in Credits Commutation Co. v. United States (*supra*). There, the order of the Circuit Court stated that the prayers for leave to intervene were denied, "not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene". Appeals were taken to the Circuit Court of Appeals, which granted motions to dismiss the appeals. Thereupon, appeals were allowed to this Court, which were also dismissed. In its opinion, this Court quoted from the opinion of the Circuit Court of Appeals, as follows (pp. 315-316):

> "When such an action is taken, that is to say, when leave to intevene in an equity case is asked and refused, the rule, so far as we are aware, is well settled, that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration, to which a third party asserts some right which will be lost in the event that he is not allowed

to intervene before the fund is dissipated. In such cases, an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief."

III. The present case, of course, bears no similarity to the cases referred to, in which the petitioner claims an interest in some fund or property which is to be disposed of in the action and in which he would be deprived of all opportunity of asserting his rights were he not permitted to intervene.

SECOND.

The City already represented in the litigation, and the question involved in the appeal academic.

That there is no substantial merit in this appeal and that its purpose is to delay the complainant in obtaining the relief to which it is entitled, is shown by the fact that the City has been represented in the litigation and has taken part therein to the same extent that would have been possible for it to do had its petition for leave to become a formal party been granted (affidavit, *post*, p. 15).

After the District Court had denied the application of the City to intervene, the Corporation Counsel of the City, in his official capacity, was substituted as solicitor for Mr. Swann, the District Attorney. A motion by the complainant, to set aside the order of substitution, was denied, on the ground, asserted by the City, that the Corporation

Counsel had undoubted power to appear for the District Attorney. Extracts from the affidavit of the Corporation Counsel, claiming this right, are given in the annexed affidavit (*post*, pp. 14-15); which also shows that during the entire trial, the City, through its Corporation Counsel, was continuously active in taking a prominent part in the defense, not only in the cross-examination of the complainant's witnesses, but also in employing accountants, engineers and expert witnesses of its own. The question of the right of the City to intervene has therefore become academic.

The trial before the Special Master, which continued almost uninterruptedly for nearly eight months, and the record of which comprises more than 14,000 pages, exclusive of about 900 exhibits, was concluded on March 5, 1920; and it is expected that the Master's report will be filed and a decree entered very shortly (affidavit, *post*, p. 15). Great hardship to the complainant would thus result by postponing for an indefinite period the relief to which it is entitled, merely for the purpose of permitting the City to become a nominal party to the litigation, when it has been an actual party throughout the trial.

THIRD.

The public interest already completely represented and protected.

The City is neither a necessary nor a proper party to this suit, because all parties charged with the duty of upholding the Eighty-cent Act (L.

1906, Ch. 125), which is attacked in this litigation, are already before the Court: the Public Service Commission, the Attorney General and the District Attorney of New York County.

I. There are two Public Service Commissions in the State of New York: one for the First District, comprising the City of New York, and the other for the remainder of the State. Absolute power of regulation and enforcement of the law is conferred upon the Commission (L. 1907, Ch. 429, as amended).

The Commission is, therefore, the sole body charged with the duty of representing the consumers in the City of New York.

In re Engelhard, 231 U. S., 646.

II. The Attorney General is required by law to appear in all cases involving the constitutionality of an act of the legislature; and the Eighty-cent Act is assailed on the ground that it is unconstitutional.

Executive Law, Sec. 68.

III. The District Attorney of the County in which a suit is triable is charged with the duty of enforcing the penalties prescribed by the statute.

Code Civ. Pro., Sec. 1962.

IV. All of the said officials are parties defendant herein and have taken an active part in the defense of this suit (affidavit, *post*, pp. 15-16).

V. Extracts from the New York Statutes referred to herein are printed in the main brief to be submitted on behalf of the appellee on the argument of this appeal.

FOURTH.

Frivolous character of the appeal.

If the City was not a necessary party to this litigation, that is, if the order denying its application to intervene did not deprive it absolutely of a right which it could not otherwise protect, the order was not final and, therefore is not appealable. The only pretense of such a right is that, under an entirely distinct statute (L. 1905, Ch. 736), the price of gas to the City is limited to seventy-five cents, and that if the Eighty-cent Act in favor of the private consumers should be declared void, that statute may be attacked by the Company some time in the future and the City may be prejudiced in maintaining it.

1. The record on appeal expressly shows that the Company has no intention of attacking the Seventy-five-cent Act (Record, p. 18). Moreover, the validity of that Act was determined by this Court in the previous litigation, in which the City was made a party for the reason that the validity of that Act was then assailed.

> Willcox *v.* Consolidated Gas Co., 212 U. S., 19, 54.

A decision in the present case in favor of the Gas Company, which would enable it to establish a rate to its private consumers permitting an adequate return on its entire investment, would make it absolutely impossible for the Company, under the previous decision of this Court (212 U. S., 54), to question the seventy-five-cent rate.

The contention of the City has not even the basis of the personal interest which might prompt any one of the 500,000 individual consumers of the Company (Record, p. 15) to intervene.

II. If the City was not a *necessary* party to the litigation (which is not pretended), then even if it were a *proper* party, its application to intervene was within the discretion of the District Court; and its decision will not be reviewed by this Court, even if the lower court treated the question as one of right and not of discretion.

Credits Commutation Co. *v.* U. S., 177 U. S., 311, 315.

FIFTH.

The appeal should be dismissed.

March 20, 1920.

JOHN A. GARVER,
Counsel for appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

Affidavit of Charles A. Vilas.

STATE OF NEW YORK,
County of New York.

CHARLES A. VILAS, being duly sworn, says:

1. I am an attorney at law, associated with the firm of Shearman and Sterling, solicitors for the Complainant-Apellee herein, and am familiar with all the proceedings which have been had in this suit.

2. This appeal is from an order of the Circuit Court of Appeals for the Second Circuit, entered July 19, 1919, affirming an order of the District Court of the United States for the Southern Dis-

trict of New York, dated March 3, 1919, which denied the petition of the appellant for leave to intervene in this cause as a party defendant. The appeal to this Court was taken on September 23, 1919. A petition for a writ of *certiorari* to review the said order of the Circuit Court of Appeals was also filed by the appellant, on October 6, 1919, and was denied by this Court on October 20, 1919. On February 20, 1920, the appellant made a motion to advance the argument of the appeal, upon which this Court set down the appeal for argument on April 12, 1920, the same date on which this motion is made returnable.

3. This suit, which was commenced on January 16, 1919, is brought by the complainant, Consolidated Gas Company of New York, for the purpose of having declared void the so-called "Eighty-cent Gas Law" of New York (L. 1906, Chap. 125), which limits the price of gas to be charged to private consumers in the City of New York to eighty cents per thousand cubic feet, on the ground that the rate is confiscatory and therefore deprives the complainant of its property without due process of law. The Public Serice Commission of the State of New York, First District, the Attorney General of the State of New York, and the District Attorney for the County of New York, were made parties defendant.

4. After the petition of the City of New York for leave to intervene as a party defendant in the said suit had been denied by the District Court on March 3, 1919, the Corporation Counsel of the said City was substituted, as such, as solicitor for the defendant, Edward Swann, District Attorney for the County of New York, by an order of substitution

dated May 15, 1919. The complainant moved to vacate the substitution; but, upon the Corporation Counsel's affidavit that it was his duty, as attorney and counsel for the City of New York, to appear for the District Attorney, the motion was denied on June 6, 1919; and the Corporation Counsel has ever since continued to act as solicitor for the defendant, Swann, in this suit.

The following extracts from an affidavit made by Mr. William P. Burr, the Corporation Counsel of the City of New York in 1919, in opposition to the complainant's motion to vacate his substitution as solicitor for the District Attorney, shows that the real purpose of the substitution was to permit the City, although held by the Court not to be a proper party, to defend the action as fully as it it were a party:

> "Deponent alleges that the responsibility of defending said action and appearing in behalf of said District Attorney herein is within his duty as attorney and counsel for The City of New York, its officers and agents, and the officers of the counties embraced in said City."
>
> * * * * *
>
> "That under the direction of your deponent, a large number of cases affected the rates at which various public services are performed in The City of New York have been conducted by the office of the Corporation Counsel before the Public Service Commission of the First District and before the Supreme Court of the State of New York in the counties of Kings, Queens, New York and of the Bronx. Prominent among these cases are those affecting the rates of the Newtown Gas Company, the Woodhaven Gas Company, the Brooklyn Borough Gas Company, The Bronx Gas and Electric Company and the Kings County Lighting Company. That by reason of the connection

of the said Corporation Counsel's office with these cases, deponent has trained a number of experts who are very proficient in this branch of litigation. The services of these men are available in the conduct of the case at bar without expense to the taxpayers other than the regular compensation of said City employees. That, moreover, the office of the Commissioner of Accounts, which is an office provided by the Greater New York Charter, is available to your deponent for the purpose of making investigations as to the accounts of the complainant and as to its operating expenses."

5. The trial of this suit was commenced before the Special Master on July 22, 1919, and proceded almost continuously thereafter until March 4, 1920, when it was concluded. The Special Master has appointed March 22, 1920, as the date on which he will hear final arguments; and it is expected that he will file his report and that a decree will be entered shortly thereafter. The record of the trial is exceedingly voluminous and comprises more than 14,000 pages, exclusive of 900 exhibits, many of them of great length.

6. During the entire trial, the Corporation Counsel has been represented at every session by Mr. John P. O'Brien, one of the Assistant Corporation Counsel, who has appeared for the City in all recent rate cases to which it has been a party. Mr. O'Brien has taken a very active, and the most prominent, part in the defense of the suit, has cross-examined the witnesses for the complainant at great length, and has examined most of the witnesses called for the defense. The City of New York has also employed accountants, engineers and expert statisticians, who have assisted the Corpo-

ration Counsel in connection with the defense and have appeared as witnesses. Mr. Terence Farley, the solicitor for the defendant, Lewis Nixon, constituting the Public Service Commission for the First District, who is the defendant most vitally interested in the suit, since he is the public officer charged by law with the duty of enforcing the provisions of the statutes under attack, has consumed probably not more than one-third as much of the time of the Court as has Mr. O'Brien; and this is also true of the Attorney General.

CHARLES A. VILAS.

Sworn to before me,
March 20, 1920.
ARTHUR C. POWER
Notary Public, Kings County
County Clerks No. 197 Registers No. 1122
Cert. Filed in N. Y. Co. Clerks No. 329 Reg. No. 1351
Bronx Co. Clerk's No. 19 Reg. 2150
Term Expires March 30, 1921.

No. 566

Supreme Court of the United States

OCTOBER TERM, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

—against—

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

Notice and Petition to Advance Case

WILLIAM P. BURR,
Corporation Counsel of
The City of New York and
Solicitor for Appellant,
Municipal Building,
City of New York.

(17995) THE LEWIS PRINT, 8-12 READE ST., NEW YORK

Supreme Court of the United States

OCTOBER TERM, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee, *—against—* CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Defendants, THE CITY OF NEW YORK, Appellant.	Cal. No. 566.

Sirs:

Please take notice that on the petition of William P. Burr, Corporation Counsel of The City of New York, verified the 12th day of January, 1920, a copy of which is hereto attached, and upon all the papers and proceedings herein, I will move before the Supreme Court of the United States at Washington, D. C., pursuant to Rule 26 of the Rules of the Supreme Court of the United States, on Monday, the 19th day of January, 1920, at 12 o'clock noon, at the opening of said court for

motions, or as soon thereafter as counsel can be heard, for an order advancing the above entitled appeal on the docket of said court for argument to the first Monday of February, 1920, or to such earlier particular day as to the said Court may seem just and proper.

Dated, New York, January 12th, 1920.

Yours, etc.,
WILLIAM P. BURR,
Corporation Counsel and
Solicitor for Appellant,
Municipal Building,
Borough of Manhattan,
City of New York.

To:

SHEARMAN AND STERLING, Esqs.,
Solicitors for respondent Consolidated
Gas Company of New York,
55 Wall Street,
Borough of Manhattan,
City of New York.

CHARLES D. NEWTON, Esq.,
Attorney General of the State of New York,
57 Chambers Street,
Borough of Manhattan,
City of New York,

EDWARD SWANN, Esq.,
District Attorney for the County of New York.

TERENCE FARLEY, Esq.,
Solicitor for respondent, Lewis Nixon, constituting the Public Service Commission for the First District.

Supreme Court of the United States

OCTOBER TERM, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee, —*against*— CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Defendants, THE CITY OF NEW YORK, Appellant.	Cal. No. 566.

To the Honorable Supreme Court of the United States:

The petition of William P. Burr, Corporation Counsel of The City of New York, respectfully shows to this Court on information and belief:

I. This is a petition made in support of a motion to advance on the docket of this Honorable Court the above entitled appeal pursuant to Rule 26, Subdivisions 6 and 7 of the rules of the Supreme Court of the United States.

II. The above entitled appeal was brought by The City of New York to review an order of the Circuit Court of Appeals dated July 7, 1919, and filed and entered July 18, 1919, affirming an order of the District Court of the United States for the Southern District of New York, dated March 3, 1919, denying as matter of law an application of The City of New York for leave to intervene as a party defendant in the above entitled action commenced on January 16, 1919, in the said District Court of the United States for the Southern District of New York, and brought to have declared unconstitutional Chapter 125 of the Laws of the State of New York of 1906, providing a rate for gas sold to private consumers of 80c. per 1,000 cubic feet within certain portions of The City of New York because in contravention of the 14th Amendment of the Constitution of the United States and Section 10, Article I, thereof.

III. The relief prayed for in the bill of complaint in this action specifically reads as follows:

> "1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.
>
> 2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

IV. Chapter 125 of the Laws of 1906, the constitutionality of which was questioned by this suit, related solely to the affairs and government of the City of New York and was accepted by said City, under the provisions of Article XII, Section 2, of the State Constitution.

V. The City of New York was not made a party to this suit. The price of gas supplied to The City of New York was and now is fixed at 75 cents per thousand cubic feet by another act, which applies exclusively to The City of New York, to wit: Chapter 736 of the Laws of 1905.

VI. Charles D. Newton, as Attorney General of the State of New York, was made a party and considered a party necessary to a complete determination of this cause for the reason that, by virtue of Section 1962 of the Code of Civil Procedure it

is within the power and it is the duty of the Attorney General to set in motion proceedings for the recovery of the penalties prescribed by the said statute whenever an attempt is made to charge more than the letter of the statute permits, and, under Section 68 of the Executive Law, the Attorney General is the officer charged, under the procedure there set forth, with the duty of defending the constitutionality of statutes. For these reasons he is a necessary party-defendant, and the determination would not be complete without his presence.

Edward Swann, as District Attorney of the County of New York, was made a party for the reason that he is also an officer charged under said Section 1962 of the Code of Civil Procedure with the power and duty of bringing an action to recover the penalties provided by said Chapter 125 of the Laws of 1906.

The provision of said Chapter 125 of the Laws of 1906 relating to penalties has been practically held unconstitutional by the Supreme Court of the United States. As to these penalties, Mr. Justice Peckham, delivering the opinion of the Supreme Court in *Consolidated Gas Company* v. *Wilcox, as Chairman, etc., and Others* (212 U. S., 19), said, in part:

> "We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the Court below, they are undoubtedly void within the principle decided in *ex parte Young*

(209 U. S., 123, and the cases there cited), because so numerous and overwhelming in their amount."

It appears from an affidavit of said Edward Swann, filed in this suit with the Clerk of the District Court of the United States for the Southern District of New York, that the office of the District Attorney of the County of New York is not equipped to undertake the defense of a suit of this character and that the office of the District Attorney of the County of New York is concerned primarily with the prosecution of criminal offenses, and it further appears that the District Attorney of the County of New York is a necessary defendant in the above-entitled suit largely because of what might be called a statutory accident.

While the Corporation Counsel of The City of New York at the request of the defendant Edward Swann, District Attorney of the County of New York, is solicitor of the latter in this action, said District Attorney was made a defendant solely because of the penalty sections in the statute assailed and thus the Corporation Counsel of The City of New York is in no position to adequately represent and protect the interests of The City of New York.

The defendant Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, was made a party to this cause of action for the reason that it is provided by Section 75 of the Public Service Commission Law (Chapter 429 of the Laws of 1907) that whenever the said Commission shall be of opinion that a gas company is failing or omitting to do anything required by law, or is doing anything con-

trary to or in violation of law, the said Commission shall direct their counsel to begin proceedings in the Supreme Court of the State of New York to have such action prevented by injunction or mandamus.

VII. Section 2 of Article XII of the Constitution of the State of New York above mentioned classifies cities, defines general and special city laws, and provides for the acceptance of laws relating to the property affairs and government of cities by the Mayors of such cities.

VIII. The Legislature of the State of New York passed in 1913, Chapter 247 of that year, known as the "*Home Rule Law*," which grants to the City

> "power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power or to exclude other powers comprehended within this general grant."

Among the specific powers granted to the City by this act are the following:

> "To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

The term "general welfare" as used in the law just quoted, is defined in Section 21 of said law as follows:

> "§21. *Public or municipal purpose and general welfare defined.* The terms 'public or municipal purpose' and 'general welfare' as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

IX. Also in the year 1913 the Legislature of the State of New York passed Chapter 442 of that year amending the "Executive Law" by adding Section 68 thereof, which provides in part as follows:

> "Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order directing the party desiring to raise such question to serve notice thereof on the attorney-general, and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the

attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

X. The Greater New York Charter as amended provides, in part, as follows:

"Section 255.

* * * The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law, in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof or of the people thereof, * * *"

The respondent herein, the Consolidated Gas Company of New York, uses the streets of The City of New York and enjoys the protection of its fire, police, water and other departments and The City of New York levies taxes upon said respondent corporation herein under the provisions of law and from many points of view of municipal administration is interested in the respondent herein and its operation. The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration of The City of New York, who are consumers of the respondent, the Consolidated Gas Company of New York, and affects their health, happiness, comfort and convenience. Under the express pro-

visions of said Chapter 247 of the Laws of 1913 the City must preserve and care for the comfort and general welfare of the People of the City who are consumers of the respondent, the Consolidated Gas Company of New York, and therefore must protect and advise them against this attack upon this legislative gas rate fixed by Special City Act in their favor at 80c. per 1,000 cubic feet of gas sold.

XI. One of the issues necessarily involved in this litigation is the cost of producing and distributing gas. The confiscatory character of this rate may depend upon the 75-cent rate allowed The City of New York. The factors which go to make up the 80-cent rate and the 75-cent rate are so closely related and connected that it is impossible to separate them in this rate litigation and to say which elements going to constitute the rate apply to the 80-cent and which apply to the 75-cent rate.

As a result of this litigation the Special Master and the Court will have to make and approve findings of fact as to the cost of manufacturing and distributing gas. Should it be determined that the 80-cent rate charged to consumers generally is confiscatory and that it denies to the Consolidated Gas Company a fair return upon its investment, such a finding will undoubtedly influence not only legislation, but it will also endanger the interests of the City in any litigation which may be brought to test the constitutionality of the 75-cent rate.

Therefore, in order to protect the 75-cent rate in this litigaton, the City of New York should be allowed to intervene as a necessary and proper party defendant.

XII. The above entitled action in which this appeal has been taken went to trial before a Referee on July 22, 1919, and the complainant completed its case on December 23, 1919. The defendants, the Attorney General, the Public Service Commission for the First District of the State of New York and the District Attorney of the County of New York have yet to put in their defense and it is likely that the trial of this action will be finished on or about the 15th day of March, 1920.

I have been informed by James D. Maher, Esq., Clerk of the Supreme Court of the United States in Washington, D. C., in a letter dated October 29, 1919, that the appeal in the above entitled action "will hardly be reached in the regular call of the docket for more than a year." Thus it appears that if this appeal be not advanced by special order of this Court it will be reached only after the trial of the above entitled action shall have been finished and the same shall have been terminated without the City of New York having had an opportunity to present its defense as a party defendant.

XIII. Actions have also been brought by the following gas companies operating within The City of New York to have declared unconstitutional said Chapter 125 of the Laws of 1906, to wit:

1. East River Gas Company of Long Island City.
2. The New York Mutual Gas Light Company.
3. Northern Union Gas Company.
4. Central Union Gas Company.

5. The Standard Gas Light Company of The City of New York.
6. New Amsterdam Gas Company.
7. Brooklyn Union Gas Company.
8. New York and Queens Gas Company.

The City of New York has not been made a party to any of these suits and the actual trials thereof have not yet been commenced.

It is my purpose as Corporation Counsel of the City of New York to make a motion in each of said suits in the District Court of the United States for the Southern District of New York in which district said suits are now pending for an order of said Court permitting The City of New York to be made a party defendant therein similar to the motion made in the above entitled case which was denied by Judge Julius M. Mayer, District Judge of the Southern District of New York, and which order was confirmed by the Circuit Court of Appeals for the Second Circuit and from which said order of confirmation the above entitled appeal was taken.

If this honorable Court does not allow the above entitled appeal to be advanced and if the same be not heard at an early date The City of New York will be out of the above entitled case as a party defendant and also out of said other eight cases and on the trial of the above entitled action and of said actions it will have had no opportunity whatsoever to present facts and arguments in support of the constitutionality of said Chapter 125 of the Laws of 1906 and to defend the constitutionality of said Chapter 736 of the Laws of 1905.

XIV. The record in this appeal has already been filed with the Clerk of the United States Supreme Court since on or about October 9, 1919, and said Clerk has also received from The City of New York a check for $200 to cover the printing of said record and other necessary expenses and appellant's briefs are now ready to serve and file.

XV. On the 6th day of October, 1919, The City of New York petitioned the Supreme Court of the United States for a writ of certiorari to review said order of the Circuit Court of Appeals and same was denied.

Wherefore your petitioner asks this Honorable Court for an order or direction under Rule 26 of the Rules of the Supreme Court of the United States advancing the above entitled appeal on the docket of said Court for argument to the first Monday in February, 1920, or such earlier particular day as to this Honorable Court may seem proper.

~~Dated, January 8, 1920.~~

Dated, January 12, 1920.

WILLIAM P. BURR,
Corporation Counsel of
The City of New York,
Municipal Building,
Borough of Manhattan,
New York City.

THE SUPREME COURT.

Consolidated Gas Company of New York,
Complainant-Appellee,
—*against*—
Charles D. Newton, *et al.*,
Defendants,
" City of New York,
Appellant.

State of New York, }
County of New York, } ss.:

William P. Burr, being duly sworn, says that he has been duly designated as Corporation Counsel of The City of New York, and as such that he is an officer of the Appellant in the above-entitled action. That the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the City government, and

from statements made to him by certain officers or agents of the said City.

WILLIAM P. BURR.

Sworn to before me this 12th day of January, 1920.

L. S.

MATTHEW F. DUFFY, Notary Public, Kings Co. No. 117; Kings Co. Register's No. 1005; New York Co. Clerk's No. 5; New York Co. Register's No. 1128; Bronx Co. Clerk's No. 9; Bronx Co. Register's No. 2118; Queens Co. Clerk's No. 1201. Term expires March 30, 1921.

jurisdiction to correct the error upon appeal under Jud. Code, § 241. P. 221.

The proper course for this court in such cases is to reverse the order of the Circuit Court of Appeals with directions to dismiss the appeal. *Id.*

Reversed.

THE case is stated in the opinion.

Mr. Vincent Victory, with whom *Mr. William P. Burr* and *Mr. John P. O'Brien* were on the brief, for appellant.

Mr. John A. Garver for appellees.

Mr. Wilbur W. Chambers, *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. Robert S. Conklin*, Deputy Attorney General of the State of New York, filed a separate brief on behalf of Newton, appellee.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

The Consolidated Gas Company of New York brought suit to enjoin the enforcement of the New York eighty-cent gas law. The jurisdiction was invoked solely upon the ground that the rate was confiscatory and hence violated constitutional rights of the company. The City of New York applied for leave to intervene as a party defendant in the action. The District Judge denied the petition for intervention, stating that the Public Service Commission, the Attorney General and the District Attorney properly represented private consumers; that the City had no interest in the litigation as a consumer; was not the governmental body which had fixed the rate, and was not charged with the duty of enforcing it. From the order denying the application to intervene the City of New York prosecuted an appeal to the Circuit Court of

Appeals, and the latter court affirmed the order of the District Court.

The application was addressed to the discretion of the District Court, and the order appealed from was not of that final character which furnished the basis for appeal. *Ex parte Cutting*, 94 U. S. 14, 22; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581. As the jurisdiction of the District Court was based upon constitutional grounds only, the case was not appealable to the Circuit Court of Appeals. But, an appeal having been taken and a final order made in the Circuit Court of Appeals, we have jurisdiction to review the question of jurisdiction of that court. (Judicial Code, § 241.) *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 73.

The proper course is to reverse the judgment of the Circuit Court of Appeals, and remand the case to that court with directions to dismiss the appeal. *Four hundred and forty-three Cans of Egg Product* v. *United States*, 226 U. S. 172, 184; *Carolina Glass Company* v. *South Carolina*, 240 U. S. 305, 318.

So ordered.

CITY OF NEW YORK *v.* CONSOLIDATED GAS COMPANY OF NEW YORK ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 566. Argued April 22, 1920.—Decided June 1, 1920.

A city applied to intervene in a suit brought by a gas company to enjoin state officials from enforcing a rate alleged to be confiscatory. *Held*, that the application was addressed to the discretion of the District Court, and that an order denying it was not final for purpose of appeal. P. 221.

When the Circuit Court of Appeals erroneously assumes jurisdiction of a case in which the District Court's jurisdiction is based wholly on constitutional grounds, and makes a final order, this court has